A TREATISE OF THE PLEAS OF THE CROWN:

OR A

SYSTEM of the Principal Matters relating to that SUBJECT, digeſted under their proper Heads.

BOOK II.

By *WILLIAM HAWKINS*, of the *Inner Temple*, Eſq;.

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Digested under Proper Heads.

BOOK II.

BY WILLIAM HAWKINS,

Of the Inner Temple, Esq.

To the Right Honourable

THOMAS, Lord *PARKER*,

Baron of *MACCLESFIELD*,

AND

Lord High Chancellor of *Great Britain*.

My LORD,

THE Experience I have ſo often had of your Lordſhip's Goodneſs, cannot but encourage me to hope for the Continuance of it: And the Succeſs of my former Endeavours under the Protection of your Lordſhip's Name, is a ſufficient Aſſurance, That if I can be ſo happy as to have your Lordſhip's Approbation and Encouragement, I need not deſire any other.

NOR is my Application to your Lordſhip in Behalf of a Common Law Treatiſe, any way diſcouraged by your Lordſhip's Removal to the Station you at preſent adorn; for tho' the Publick Good, and his Majeſty's Service, have put you under a Neceſſity of leaving the Common Law Courts, yet nothing can ever make you ceaſe from being the moſt aſſured Friend, and Patron, as well as the moſt exquiſite Maſter of the Common Law. And the Greateſt Lovers of it have the leſs Regret for the Loſs of your Lordſhip's Preſence among them, from the Honour the Law it ſelf has received by your Lordſhip's Advancement, whereby the World has been effectually convinc'd, That nothing ſo much conduces to make a Con-

Conſummate Chancellor, as the moſt perfect Skill and Experience in the Common Law.

It is with the utmoſt Pleaſure we obſerve your Lordſhip with ſo much Steadineſs adhere to thoſe ſtated Boundaries of Property, which our Anceſtors have always had in ſuch high Venerarion, and which your Lordſhip never departs from, but in ſuch Caſes, wherein evident Equity, Common Senſe, and Natural Juſtice, undeniably point out an Exception.

It is to your Lordſhip we are obliged for the Removal of that Vulgar Prejudice, That the Rules of Law and Equity could not poſſibly be reconciled: As your Lordſhip had formerly convinced us, That there is nothing in the Common Law rightly underſtood, that is any way repugnant to Equity; you have now given us the like Satisfaction, That there is no Rule of Equity skilfully applied, that in the leaſt contradicts the true Reaſon of the Common Law.

I am,

My Lord,

With the greateſt Reſpect,

Your Lordſhip's moſt dutiful,

and moſt obliged Servant,

William Hawkins.

AN ANALYSIS OF THE Second BOOK OF THE Pleas of the Crown.

ALL Courts of criminal Juriſdiction are Courts of Record, (ch. 1. ſect. 14.) and derive their Authority from the Crown, ch. 1. ſect. 1, *&c.*

The Principal Courts of this Kind, are,

1. The Court of the Lord High Steward, ch. 2.
2. The Court of King's Bench, ch. 3.
3. The Court of the Conſtable and Marſhall, ch. 4.
4. The Court of the Juſtices of *Oyer* and *Terminer*, ch. 5.
5. The Court of Juſtices of Gaol-Delivery, ch. 6.
6. The Court of the Juſtices of Aſſiſe and *Niſi prius*, ch. 7.
7. The Court of Seſſions of Juſtices of Peace, ch. 8.
8. The Court of the Coroner, ch. 9.
9. The Sheriff's Torn, ch. 10.
10. The Court-Leet. ch. 11.

The firſt Thing to be done in order to the bringing a Criminal to Juſtice is to arreſt him.

Arreſts are either without Proceſs from a Court of Record, or by Vertue of ſuch Proceſs.

And firſt, Arreſts without ſuch Proceſs, are either,

1. By Private Perſons, or,
2. By Publick Officers.

Arreſts of this Kind by Private Perſons are either,

1. Such as are commanded and enjoined by Law, (ch. 12. ſect. 1 *to* 8.) or,
2. Such as are permitted by Law, ch. 12. ſect. 8 *to* 18.) or,
3. Such as are rewarded by Law, ch. 12. ſect. 22, *&c.*

Arreſts of this King by Publick Officers, are either,

1. By Watchmen, (ch. 13. ſect. 1 *to* 7.) or,
2. By Conſtables, (ch. 13. ſect. 7 *to* 12.) or,
3. By Bailiffs of Towns, (ch. 13. ſect. 12.) or,
4. By Juſtices of Peace, which are either,
   1. By Parol, (ch. 13. ſect. 14.) or,
   2. By Warrant, ch. 13. ſect. 15. *to the End of the Chapter.*

Perſons arreſted are either to be bailed, ch. 15.

Or committed, ch. 16.

Perſons may be criminal in preventing the bringing of Offenders to Publick Juſtice, ſeveral Ways,

1. Before any Arreſt made,
2. After an Arreſt.

Perſons may be ſo guilty before any Arreſt made,
1. By oppoſing an Arreſt, ch. 17. ſect. 1.
2. By ſuffering a Criminal to eſcape, ch. 17. ſect. 2, 4.
3. By flying from an Arreſt, ch. 17. ſect. 3. ch. 49. ſect. 14, 15, 16.

Perſons may be ſo Guilty after an Arreſt, either in Reſpect of an Arreſt of themſelves, or of others.

Their Offence in Reſpect of an Arreſt of themſelves, if without Force, is called an Eſcape, ch. 17. ſect. 5.

If with Force, is called a Breach of Priſon, ch. 18.

Their Offence in Reſpect of the Arreſt of others, is either,
1. Without Force, or,
2. With Force.

Such Offences, without Force, come under the Notion of Eſcapes, and are either,
1. By Officers, (ch. 19.) or,
2. By Private Perſons, ch. 20.

Such Offences with Force come under the Notion of Reſcous, ch. 21.

Secondly, Arreſts by Proceſs from a Court of Record may be made by Vertue of two Kinds of Proceſs,
1. Upon ſuch as is awarded by the Diſcretion of the Court, upon a bare Suggeſtion, or the Knowledge of the Juſtices.
2. Upon ſuch as is awarded on an Appeal, Indictment, or Information.

Proceſs of the firſt Kind is generally called an Attachment, (ch. 22.) and lies either againſt,
1. The Officers of the Court, as,
   1. Sheriffs, and Bailiffs, ch. 22. ſect. 2 *to* 6.
   2. Attorneys, ch. 22. ſect. 6 *to* 12.
   3. Other Officers of the Court, ch. 22. ſect. 12.
   4. Jurors, ch. 22. ſect. 14 *to* 25. or,
2. Againſt others, as,
   1. Inferior Judges, ch. 22. ſect. 25 *to* 30.
   2. Counſellors, ch. 22. ſect. 30.
   3. Gaolers, ch. 22. ſect. 31.
   4. Any other Perſons whatſoever, ch. 22. ſect. 33. *to the End of the Chapter.*

Proceſs on an Appeal, Indictment, or Information, ſuppoſes ſuch Appeal, Indictment, or Information to be firſt exhibited.

An Appeal is either,
1. By an Innocent Perſon, which may either be by Writ, or by Bill, ch. 23.
2. By an Offender confeſſing himſelf Guilty, who is commonly called an Approver, ch. 24.

Indictments (ch. 25.) are of two Kinds,
1. Such as are grounded on the Common Law, ch. 25. ſect. 53 *to* 101.
2. Such as are grounded on Statute, ch. 25. ſect. 101 *to* 120.

Informations are of two Kinds,
1. Such as are merely the Suit of the King, ch. 26. ſect. 1 *to* 17.
2. Such as are partly the Suit of the King, and partly the Suit of the Party, ch. 26. ſect. 17. *to the End of the Chapter.*

Proceſs on an Appeal, Indictment, or Information, may be either conſidered,
1. In General, without any Particular Regard to Proceſs of Outlawry, ch. 27. ſect. 1 *to* 113.
2. In Particular, with Regard to ſuch Proceſs only, ch. 27. ſect. 113 *to the End of the Chapter.*

A Criminal being brought into Court is to be arraigned, or put upon his Trial, the Manner whereof may be conſidered,
1. As it relates to all Criminals in general, ch. 28.
2. As it relates to Principals and Acceſſaries in Particular, ch. 29.

The Party being arraigned, either,
1. Stands Mute, (ch. 30.) or,
2. Confeſſes, (ch. 31.) or,
3. Pleads.

Pleas are either,
1. Dilatory, or,
2. In Chief.

The Dilatory are either,
1. Declinatory, or,
2. In Abatement, ch. 34.

The Declinatory are either,
1. Of the Privilege of Sanctuary, (ch. 32.) or,
2. Of the Benefit of the Clergy, ch. 33.

Pleas in Chief are either,
1. In Bar, or,
2. The General Iſſue, ch. 38.

The Principal Pleas in Bar are,
1. That of *Autrefoits acquit*, ch. 35.
2. That of *Autrefoits attaint* or *convict*, ch. 36.
3. That of Pardon, ch. 37.

The Plea of Not Guilty is triable either,
1. By the Country, or,
2. By the Peers, (ch. 44.) or,
3. By Battel, ch. 45.

In order for a Trial by the Country a Jury muſt be returned,
1. From the proper County, ch. 40.
2. By proper Proceſs, ch. 41.
3. Before a proper Court, ch. 42.

The

The Jurors being returned into Court may in many Cases be challenged.

Such challenges may be considered either,

1. Without any particular Regard to Aliens, or,
2. As they particularly relate to Aliens, ch. 43. sect. 34 *to the End of the Chapter.*

Those of the first Kind, are either,

1. Such as may be taken on the Part of the King, (ch. 43. sect. 2. 3.) or,
2. Such as may be taken on the Part of the Prisoner.

A Challenge may be taken on the Part of a Prisoner, either,

1. Peremptorily, (ch. 43. sect. 5 *to* 10.) or,
2. For Cause, ch. 43. sect. 10 *to* 34.

The Jury being sworn, are to be guided by their Evidence, ch. 46.

Whereupon they must give some Verdict, either General or Special, ch. 47.

Judgments in Criminal Cases are of two Kinds,

1. Such as expresly sentence the Party to the Punishment proper for his Crime.
2. Such as give no such express Sentence.

Of Judgments by such express Sentence there are two Kinds,

1. Such as are fix'd and stated, and always the same for the same Species of Crimes, ch. 48. sect. 2 *to* 14.
2. Such as are discretionary and variable according to the different Circumstances of each Case, ch. 48. sect. 14 *to* 21.

Of Judgments which give no such express Sentence, there are also two Kinds,

1. Outlawry, ch. 48. sect. 21, 22, 23.
2. Abjuration, ch. 48. sect. 24.

The most considerable Consequences of an Attainder, *&c.* are,

1. The Forfeiture of Lands and Goods, ch. 49. sect. 1 *to* 42.
2. The Loss of the Wife's Dower, ch. 49. sect. 42 *to* 47.
3. The Corruption of Blood, ch. 49. sect. 47 *to the end of the Chapter.*

Forfeitures of Lands and Goods are either,

1. By the Common Law, (ch. 49. sect. 1.) *to* 18.) or,
2. By Statute, ch. 49. sect. 18 *to* 30.

Judgments may be avoided either,

1. Without Writ of Error, ch. 50. sect. (10 *to* 17.) or,
2. By Writ of Error.

They may be avoided by Writ of Error, either,

1. For Faults apparent in the Record, ch. 50. sect. 1.) or,
2. For Matters *debors* the Record, ch. 50. sect. 2 *to* 10.

The Party condemned is either to be.

1. Reprieved, (ch. 51. sect. 8, 9.) or,
2. Executed, ch. 51. sect. 1 *to* 8.

A TREA-

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A TREATISE OF THE PLEAS OF THE CROWN.

BOOK II.

CHAP. I.

Of Courts of criminal Juriſdiction in general.

HAVING in the firſt Book endeavoured to ſhew the Nature of criminal Offences, I am now to ſhew, in what Manner the Offenders are to be brought to Puniſhment; and in Order hereto I ſhall conſider,

1. The Nature of the Courts which have Juriſdiction over ſuch Offences.
2. In what Manner the Offenders are to be proceeded againſt by ſuch Courts.

And first, for the better Understanding of the Nature of such Courts, I shall premise some Considerations concerning them in general, and then consider the Nature of the principal of them in particular.

As to the Nature of such Courts in general, I shall consider,

1. What is requisite to the Constitution of their Authority.
2. What is incidental to all such Courts in general.

S.P.C. 54, 55. *Sect.* 1. As to the first Point I shall take it for granted, That the King being the supream Magistrate of the Kingdom, and intrusted with the whole executive Power of the Law, no Court whatsoever can have any such Jurisdiction, unless it some Way or other derive it from the Crown.

Dalt. ch. 1. S. P. C. 54 b. 4 Inst. 71. 2 R. 3. 11. a. Speed 521, 524. 1 Rol. Ab. 535. *Sect.* 2. Yet it seems, That the King himself cannot sit in Judgment upon any Indictment, because he is one of the Parties to the Suit; and therefore where it is said in some of our ancient Histories, that our Kings have sometimes sate in Person with the Justices at the Arraignment of great Offenders, probably it ought not to be intended that they came as Judges, but as Spectators only, for the greater Solemnity of the Proceeding.

[a] 4 Inst. 70, 71. 2 Inst. 103. 8 H. 4. 13. b. 14. a. 20. 2 R. 3 11. [b] Madox *History of the* Exchequer, *from Fol* 5, *to* 17, *and Fol.* 56. *to* 85. Dalton ch. 1. [c] 28 Ass. pl. 52. [d] 4 Inst. 73. *Sect.* 3. And it is said by [a] Sir *Edward Coke*, That the King has committed and distributed all his whole Power of Judicature to several Courts of Justice; and though it may be argued with the highest Probability both from the Nature of the Thing, and the constant Tenor of our [b] ancient Records and Histories since the Conquest, and also from the Form of all Process in the King's Bench, and Chancery, which is always made returnable before the [c] King himself, That in old Time our Kings in Person, often determined Causes between Party and Party, proper for those Courts; yet at this Day, by the long, constant and uninterrupted Usage of many Ages, our [d] Kings seem to have delegated their whole judicial Power to the Judges of their several Courts, which by the same immemorial Usage have gained a known and stated Jurisdiction, regulated by certain and established Rules, which our Kings themselves cannot alter without an Act of Parliament.

6 H. 7. 4. b. 5. a. Bro. Pat. 53. 4 Inst. 125, 127. 6 Co. 11. b. 12 a. *Sect.* 4. For it seems to be clearly agreed, That the King cannot give any Addition of Jurisdiction to an ancient Court, but that all such Courts must be holden in such Manner, and proceed by such Rules, and in such Cases only, as their known Usage has limited and prescribed; and from hence it follows, That as the Court of King's Bench cannot be authorized to determine a mere real Action between Subject and Subject, so neither can the Court of Common Pleas to inquire of Felony or Treason.

4 Inst. 87. 1 Sid. 338. *Sect.* 5. Nay it is said by some, That the King is so far restrained by the ancient Forms in all Cases of this Nature, that his Grant of a judicial Office for Life, which has been accustomed to be granted only at Will, is void.

42 Ass. 12, 13. 4 Inst. 164. Bro. Commission, 15, 16. F.N.B 110. b. Bro. Indictment 22, 38. *See* 12 Co. 31. *Sect.* 6. And the Law is so jealous of any Kind of Innovation, in a Matter so highly concerning the Safety of the Subject, as not to endure any the least Deviation from the old known stated Forms, however immaterial it may seem, as will be more fully shewn, *Ch.* 5. *Sect.* 1.

Sect.

Sect. 7. And from the like Reason it follows, that Commissions [a] to [a] seize the Goods and imprison the Bodies of all Persons, who shall be notoriously suspected of Felonies or Trespasses, without any Indictment or other legal Process against them, are illegal and void.

[a] 42 Ass 5. Bro. Commission, 3, 15, 16. 2 Inst. 54.

Sect. 8. And it is said, That the King cannot grant any new Commission whatsoever, that is not warranted by ancient Precedents, however necessary it may seem, and conducive to the publick Good; and therefore [b] Commissions to assay Weights and Measures, being of a new Invention, were condemned by Parliament; and it is said by [c] Sir *Edward Coke*, That the King could not authorize Persons to take Care of Rivers and the Fishery therein, according to the Method prescribed by the Statute of *Westm.* 2. *Ch.* 47. before the making of that Statute.

[b] 4 Inst. 163, 245. 18 E 3. ch. 1, 4. [c] 2 Inst. 478. [d] 1 Rol. Abr. 382. b. 6 Mod. 87. 9 E 4. 30. b. 31. a.

Sect. 9. As all Judges must derive their Authority from the Crown, by some Commission warranted by Law, they must also exercise it in a legal Manner, and hold their Courts in their proper Persons; for they cannot act by [d] Deputy, nor any Way transfer their Power to another, as the Judges of Ecclesiastical Courts may.

Bro. Judges, 11. [e] Latch 7.

Sect. 10. [f] But it seems, That regularly where there are divers Judges of a Court of Record, the Act of any one of them is effectual, especially if their [g] Commission do not expresly require more.

[f] Bro. Coron. 201. 14 H 4. 34. b. 35. a.

Sect. 11. It hath been [h] resolved, That by the Common Law, all Patents of the Justices of either Bench, Barons of the Exchequer, Sheriffs, Escheators, Commissioners of *Oyer* and *Terminer*, Gaol-Delivery, and of the Peace, are determined by the Death of the King who made them. Also it seems [i] certain, That at the Common Law (before 1 *Ed.* 6. 7. set forth more at large, *Ch.* 6.) if one had been convicted of any Offence before any such Commissioners, and the King had died before Judgment, no Judgment at all could have been given, because the King was dead for whom the Judgment was to have been given, and because the Authority of the Judges was determined. Also it is said, that at [k] Common Law a Person attainted in the Time of a former King, could not have been executed without a new Warrant. Yet it hath been adjudged, That the Authority of a [l] Coroner or Verderor ceases not by the Demise of the King in whose Reign they were chosen; and that the Office of a [m] Sheriff, in such Places where he is chosen by a Corporation, having by its Charter the Inheritance of the Office, does not determine by the Demise of the King; from whence it seems also to follow, That no other Corporation Officer, who by the Charter is invested with any judicial Authority, loses it by such Demise.

23 Ass. pl. 7, 39 H 6. 41. b. 42. a. S P. C. 53. *Letters* B. C. Con. Dalis. 24, 25. Hob. 70. 2 Rol. A. 673. Crompt. 121. [g] 27 Ass 23. 2 Rol. Ab. 677. G. [h] Dalis. 15. Benloe 79. Dy. 165. pl. 2. 1 And. 44. 4 E 4. 44. Bro. Judges, 32. 1 E. 5. 1. Crom. Jur. 126. a. [i] 7 Co. 51. [k] 1 Ass. pl 8. Bro. Coron. 66. [l] Dalis. 15. Dy. 165. pl. 2. 2 Inst. 175. 1 Levin. 120. Bro. Coron. 201. Commission, 19. Crom Jur. 126. a. *But this is made a Query*, 4 E 4. 44 a b. *and* Bro. Officer, 25. *and denied in* S. P. C. fol. 49. *Letters* B. C. [m] 7 Co. 39. b.

Sect. 12. And to prevent the Disorders and other Inconveniences, which may happen upon the Death of a King, from the want of Persons armed with competent Authority to execute the Laws, before the Successor can have Time to appoint others, it was enacted by 7 & 8 *Gul.* 3. 27. *That no Commission either Civil or Military, shall cease, determine, or be void, by Reason of the Death and Demise of his said late Majesty, or of any of his Heirs or Successors, Kings or Queens of this Realm; but that every such Commission shall be, continue, and remain in full Force and Vertue, for the Space of six Months next after any such Death or Demise, unless in the mean Time superseded, determined, or made void by the next and immediate Successor, to whom the Imperial Crown of this Realm, according to the Act of Settlement in the said Statute before mentioned, is limited and appointed to go, remain, or descend.*

Sect. 13. And it is farther enacted by 1 *Annæ*, 8. Par. 2. *That no Patent or Grant of any Office or Imployment, either Civil or Military, hereafter to be made, shall cease, determine, or be void, by Reason of the Death or Demise of any*

any King or Queen of this Realm, but that every such Patent or Grant shall be, continue, and remain in full Force for six Months, next after any such Death or Demise, unless in the mean Time superseded, determined, or made void by the next immediate Successor, to whom the Crown is limited and appointed to go, remain or descend.

And it is farther enacted, Par. 5. *That no Commission of Assize,* Oyer *and* Terminer, *general Gaol-Delivery, or of Association, Writ of Admittance, Writ of* Si non omnes, *Writ of Assistance, or Commission of the Peace, shall be determined by the Death of any King or Queen of this Realm; but every such Commission and Writ shall be and continue in full Force for six Months next ensuing, notwithstanding such Demise, unless superseded and determined by the next Successor: And also no original Writ, Writ of* Nisi prius, *Commission, Process or Proceedings whatsoever in, or issuing out of, any Court of Equity, nor any Process or Proceeding upon any Office or Inquisition, nor any Writ of* Certiorari, *or* Habeas Corpus, *in any Matter or Cause, either Criminal or Civil, nor any Writ of Attachments, or Process for Contempt,* &c. *shall be determined, abated, or discontinued, by the Demise of any King or Queen of this Realm; but every such Writ,* &c. *shall remain in full Force, to be proceeded upon as if such King or Queen had lived.*

As to the second Point, *viz.* What is incidental to all such Courts in general, I shall only take Notice of the following Particulars;

[a] 2 Inst. 311, 312. Reg. 111. b. F. N. B. 85. f. 16. a. 239. d. 1 Rol. Ab. 543. E. F. pl. 3. Co. Lit. 117. b. 260. a. 2 Lev. 93. 1 Mod. 215. 3 Lev. 205. 8 Co 38. b. [b] Salk. 200.

Sect. 14. First, That all Courts of this Kind must be Courts of [a] Record; for a Court which is not of Record, can neither impose any Fine on an Offender, nor award a *Capias* against him, nor even hold Plea of a common Trespass *Vi & armis*; And from hence it clearly follows, That no Proceedings of any Court of criminal Jurisdiction, can be removed into a Superior, but by Writ of Error or *Certiorari*; and that no Averment can be taken against the Truth of any Thing recorded in any such Court; [b] And that all Courts of Common Law, that have Power given them to fine and imprison, are thereby made Courts of Record.

[c] 11 H 6 12. b. 1 Rol. Ab. 219. Y. 8 Co. 38. b. 11 Co. 43. b. Cro. E. 581. 1 Sid. 145. Brook Leet, 12, 36. [d] F. N. B 82. Dalton ch. 1. Lamb. ch. 3. 10 H. 6. 10. b. Cromp. 7. 11 Co 43 b. *seems contrary.*

Sect. 15. Secondly, That [c] all such Courts may injoin the People to keep Silence under a Pain, and impose reasonable Fines, not only on such as shall be convicted before them of any Crime on a formal Prosecution, but also on all such as shall be guilty of any Contempt in the Face of the Court, as by giving opprobrious Language to the Judge, or obstinately refusing to do their Duty as Officers of the Court; and it is said, That all such Courts, except the Court-Leet, may also imprison all such Offenders; Also it seems, [d] That even a Court-Leet is so far intrusted with the keeping of the Peace within its own Precinct, that the Steward of it may by Recognizance bind any Person to the Peace, who shall make an Affray in his Presence, sitting the Court, or may commit him to Ward, either for want of Sureties, or by Way of Punishment, without demanding any Sureties of him, in which Case he may afterwards impose a Fine according to his Discretion; from whence it follows *à fortiori*, that other superior Courts of Record have the like Power.

[e] 1 H 7. 26. a. 3 Inst. 29. [f] 27 Ass. pl. 23. 2 Rol. A. 77. G. Bro. Indictment, 17. Cromp. 121, 122. Salk. 201.

Sect. 16. Thirdly, That no [e] Judge of any such Court is compellable to deliver his Opinion before-hand, in Relation to any Question which may after come judicially before him.

Sect. 17. That no such Judge is any way punishable for a mere [f] Error of Judgment, as hath been more fully shewn in the first *Book, Chapter* 72. *Sect.* 6.

Sect.

Sect. 18. It is queſtioned, Whether all Courts of Record may not diſcharge any Perſon arreſted, during his Journeying to or from ſuch Courts, or neceſſary Attendance there by Proceſs from any other Court: However it ſeems to be agreed, That any ſuch Court may diſcharge a Perſon who ſhall be ſo arreſted in the Face of it.

Lamb. 403. *Query* 1 Keb. 845. 1 Lev. 159. 1 Brown. 15. Raym. 100. Bro. Privilege 35. Crompt. 180.

CHAP. II.

Of the Court of the High Steward of England.

AND now I am to conſider the Nature of the principal Courts of criminal Juriſdiction in particular, and

1. Of the Court of the High Steward of *England.*
2. The Court of King's Bench.
3. The Court of the Conſtable and Marſhal.
4. The Court of the Juſtices of *Oyer* and *Terminer.*
5. The Court of the Juſtices of Gaol-Delivery.
6. The Court of the Juſtices of Aſſize and *Niſi prius.*
7. The Court of the Seſſions of the Juſtices of the Peace.
8. The Court of the Coroners.
9. The Sheriff's Torn.
10. The Court-Leet.

The Office of High Steward of *England*, which anciently was Hereditary, not having been granted to any one ſince the Reign of King *Henry* the Fourth, but only *pro hac vice*, either for the Trial of a Peer on an Indictment for a capital Offence, or for the Determination of the Pretenſions of thoſe who claim to hold by Grand Serjeanty, to do certain honourable Services to the King at his Coronation: It ſeems needleſs to make a particular Inquiry, concerning the Authority of the Court of this High Officer, of which very little Mention is made in our ancient Records, or Law-Books; and therefore I ſhall content my ſelf with remarking in this Place in general, That anciently the Duty of this Office conſiſted in ſuperviſing and regulating next under the King the Adminiſtration of Juſtice, and all other Affairs of the Realm, whether Civil or Military, and that no one under the Degree of Nobility is capable of ſo honourable a Poſt; and for the particular Manner of executing this Office in the Trial of a Peer, I ſhall refer the Reader to the Chapter concerning the Trial of Peers.

3 Inſt. 58, 59. Madox *Hiſtory of the* Exchequer, 33, *&c.* Crompton *of Courts*, 84. Fleta, lib. 2. Ca. 2. 3.

13 H. 8. 11. b. 3 Inſt. 59. S. P. C. 152. infra ch. 8. ſ. 1.

CHAP. III.

Of the Court of King's Bench.

Vide supra, Ch. 1. S. 3. *and* Madox, ch. 19.

Sect. 1. THE whole Jurisdiction which is now distributed among the several Courts of *Westminster-hall*, seems in the first Reigns after the Conquest, to have been lodged in one Court, commonly called the King's Court, wherein Justice is said to have been administred sometimes by the King himself in Person, and sometimes by the High Justicier, who was an [a] Officer of very great Authority, and used in the King's Absence beyond-sea to govern the Realm as Vice-Roy.

[a] Madox, fol. 21 *and* 135. 1 Rol. Ab. 94. *Letter* A. *and* 95. *Letter* B. 2 Inst. 24, 25, 26.

Sect. 2. Out of this Court the Courts of [b] Common Pleas and Exchequer seem to have been derived, some Time before the making of the Statute of *Magna Charta*; the former of which Courts properly determines Pleas merely Civil, and the latter those relating to the Revenue of the Crown. And after the [c] Erection of these Courts, the supreme Court seems by Degrees to have obtained the Name of the Court of King's Bench, and hath always retained a supreme Jurisdiction in all criminal Matters, and also in certain personal Causes, and is still [d] supposed to have always the King himself in Person sitting in it.

[b] *See* Madox, Chap. 19. *Query* 2 Inst. 21, 22, 23. 1 Inst. 71.

[c] Madox, 543.

[d] Dyer, 187. pl. 6. Madox 543, 544. Crompton *of Courts*, 78. B.

For the better understanding the Nature of this Court, I shall consider the following Particulars:

1. In what Manner it corrects all Kinds of Misdemeanours of all Persons in general.
2. How far it reforms inferiour Courts.
3. How far its Presence suspends the Power of all other Courts.
4. What Rules are to be observed in the Form of its Proceedings.

Sect. 3. As to the first Point, it is certain, That this Court is intrusted with the highest Jurisdiction, not only over all capital Offences, but also all other Misdemeanours whatsoever of a publick Nature, tending either to a Breach of the Peace, or to the Oppression of the Subject, or to the raising of Faction, Controversy, or Debate, or to any Manner of Misgovernment; so that whatsoever Crime is manifestly against the Publick Good, it comes within the Conusance of this Court, though it do not directly injure any particular Person; neither can any private Subject, who has not forfeited his Right to the Protection of the Law, suffer any kind of unlawful Violence or gross Injustice against his Person, Liberty, or Possessions, from any Person whatsoever, without a proper Remedy from this Court, not only for Satisfaction of the private Damage, but also for the exemplary Punishment of the Offender.

See 16 Ca. 1. ca. 10. sec. 2. 11 Co. 98. 4 Inst. 71.

Sect. 4. Neither is it necessary in a Prosecution of any such Offence in this Court, to shew a Precedent of the like Crime formerly punished here, agreeing with the present in all its Circumstances; for this Court being the *Custos Morum* of all the Subjects of the Realm, where-ever it meets with an Offence contrary to the first Principles of common Justice, and

1 Sid. 168. *See the Preamble* of 16 Ca. 1.

and of dangerous Conſequence to the Publick, if not reſtrained, will adapt ſuch a Puniſhment to it as is ſuitable to the Heinouſneſs of it.

Sect. 5. And ſo high a Truſt doth the Law repoſe in the Juſtice and Integrity of this Court, as generally to leave it to the Diſcretion of its Judges to inflict ſuch Fine and Impriſonment, and even infamous Puniſhment on Offenders, as the Nature of the Crime, conſidered in all its Circumſtances, ſhall require; neither doth it confine them to make uſe of their own Priſon, but leaves them at Liberty to commit Offenders to any Priſon in the Kingdom, which they ſhall think moſt proper, and doth not ſuffer any other Court to remove or bail any Perſons condemned to Impriſonment by them. Mo. 666. pl. 913. 1 Sid. 145.

Sect. 6. Alſo this Court hath ſuch a ſovereign Juriſdiction in criminal Matters, that it may proceed as [a] well on Indictments found before other Courts, and removed into this by *Certiorari*, as on Indictments or Informations originally commenced in it, whether the Courts before whom ſuch Indictments were found be determined or ſuſpended, or ſtill *in eſſe*, and whether the Proceedings be grounded on the Common Law, or on ſome Statute making a new Law concerning an old Offence, and appointing certain Juſtices to execute it, as the Statutes of [b] forcible Entries, and the [c] Statute of *Philip* and *Mary*, againſt Perſons taking away Females under the Age of ſixteen Years from their [d] Guardians, *&c.* Neither doth a Statute which appoints, That all Crimes of a certain Denomination ſhall be tried before certain Judges, exclude the Juriſdiction of this Court without expreſs negative Words; upon which Ground it hath been reſolved, That [e] 33 *H.* 8. 12. which enacts, That all Treaſons, *&c.* within the King's Houſe, ſhall be determined before the Lord Steward of the King's Houſe, *&c.* doth not reſtrain this Court from proceeding againſt ſuch Offences: But where a Statute creates a [f] new Offence, which was not taken Notice of by the Common Law, and erects a new Juriſdiction for the Puniſhment of it, and preſcribes a certain Method of Proceeding, it ſeems queſtionable, how far this Court has an implied Juriſdiction in ſuch a Caſe.

[a] Dalis. 25.
44 E. 3. 31 b. Cromp. Juriſd. 131.
[b] 9 Co. 118. *See* B. 1. Ch. 64. S. 51.
[c] Cro. Ca. 465. 2 Lev. 179. 2 Mod. 128, 129, 130.
[d] 3 Keb. 75, 94, 106, 273.
[e] 2 Inſt. 549. 2 Jones 53.
[f] *See* 1 Sid. 296. *the Books above cited and the Chapter concerning* Indictments.

Sect. 7. But it is certain, That the Law has ſo high a Regard to this Court, that it will not ſuffer a [g] Record regularly removed into it from an inferiour one, to be remanded [h] after the Term in which it came in, (except in ſome few [i] Special Caſes;) [k] yet if the Juſtices perceive, that there is any Practice in endeavouring to remove any ſuch Record, or that the ſole Intention of ſuch Removal is the Delay of Juſtice, they may on their Diſcretion refuſe to receive ſuch Record, and may before it is filed remand it back again, for the greater Expedition of Juſtice; and upon this [k] Ground, as I ſuppoſe, where one who had pleaded Not guilty to an Appeal below, and at his Trial had challenged ſo many of his Jury, that the Inqueſt could not be taken for want of Jurors, whereupon a new *Diſtringas* was awarded, removed himſelf into the Court of King's Bench, he was ordered to be remanded: Alſo by the Conſtruction of the Statutes, which impower the Common Law Courts of *Weſtminſter*, to grant a [l] *Niſi prius* for the Trial of Iſſues joined in thoſe Courts, the Juſtices of the King's Bench may grant ſuch Trial, as well in Caſes of Treaſon and Felony as in other common Caſes; becauſe, for ſuch Trial, not the Record it ſelf is ſent down, but only the Tranſcript of it.

[g] 22 Ed. 3. 6. b. 29 Aſſ. 43. 40 Aſſ. 29. 1 Rol. Ab. 534. G. 2. 492. K. 1. 4 Inſt. 73. S. P. C. 158.
[h] 1 Rol. Re. 85.
[i] Cro. Car. 297. 1 Saunders, 97, 99. 1 Lev. 223. 1 Sid. 329.
[k] 4 Inſt. 74, 75. 16 E. 4. 5. a. Bro. Coron. 162.

Sect. 8. And it is recited by 6 *H.* 8. 6. *That divers Felons and Murderers, upon feigned and untrue Surmiſes, had oftentimes removed, as well their Bodies as their Indictments, by Writ, and otherwiſe, before the King in his Bench, and could not by the Order of the Law be remitted and ſent down to the Juſtices*

[l] 4 Inſt. 74. Ray. 364.

of

of Gaol Delivery, or of the Peace, nor other Justices, nor Commissioners, to proceed upon them after the Course of the Common Law. And thereupon it is enacted, *That the Justices of the King's Bench have full Authority by their Discretions, to remand and send down, as well the Bodies of all Felons and Murtherers, brought or removed before the King in his Bench, as their Indictments, into the Counties where the same Murders or Felonies have been committed and done; and to command all Justices of Gaol Delivery, Justices of Peace, and all other Justices and Commissioners, and every of them, to proceed and determine, upon all the aforesaid Bodies and Indictments so removed, after the Course of the Common Law, in such Manner as the same Justices of Gaol Delivery, Justices of Peace, and other Commissioners, or any of them, might or should have done, if the said Prisoners or Indictments had never been brought into the said King's Bench.*

Cromp. Jur. 213.

Ray. 367.

Sect. 9. In the Construction of this Statute it seems to have been holden, That it shall not be extended by Equity to High Treason.

Sect. 10. As to the second Point, *viz.* How far the Court of King's Bench reforms inferior Courts, there is no Doubt, but that this Court, being the highest Court of Common Law, hath not only Power to reverse erroneous Judgments given by inferior Courts, but also to punish all inferior Magistrates, and all Officers of Justice, for all wilful and corrupt Abuses of their Authority, against the known, obvious, and common Principles of natural Justice, but not for mere Mistakes, which an honest well-meaning Man may innocently fall into.

Sect. 11. As to the third Point, *viz.* How far the Presence of this Court suspends the Power of all other Courts, it is certain, That this being the [a] supreme Court of *Oyer* and *Terminer*, Gaol Delivery, and *Eyre*, doth so far suspend the Power of all other Justices of this Kind, in the County wherein it sits during the Time of its sitting in it, (if such Justices have [b] Notice of its sitting there, and even without such [c] Notice, as some say,) that all Proceedings commenced before any such Justices during such Time are void; yet it [d] seems, That such Justices may proceed upon Indictments taken in a foreign County and removed before them, because the Court of King's Bench hath nothing to do with such Indictments, unless they be removed into it. Also there seems to be the same Reason, That such Justices may proceed on Indictments taken before them, of Offences in the same County before the Term; for it is said in [e] *Keilway*, That if an Appeal be commenced before Justices in *Eyre*, and afterwards another Appeal be brought in the King's Bench, it will be a good Plea that another Appeal is depending; which shews that the King's Bench ought not without a *Certiarari, &c.* to intermeddle in an Appeal, whereof another Court is legally possessed before; and the Reason seems to be the same as to Indictments: And it is said in the same [f] Book, That if the King's Bench and Justices in *Eyre* are in one County, yet this shall not change the Power of the Justices in *Eyre*, but that if the King will make Process for any Thing not commenced before the Justices of *Eyre*, as to such Thing their Power is ceased; by which it seems to be implied, that as to what was commenced before them their Power continues: However, it is certainly the [g] safest way for any of the Justices above mentioned, proceeding on any such Indictment, to have a Special Commission for that Purpose, and it is most adviseable, that such Commission bear *Teste* in the Term.

[a] 1 H P.C. 156. 9 Co. 118. b. 27 Ass. pl. 1. 3 Inst. 27. 4 Inst. 73.

[b] 21 H 7 29. b. Bro. Commission, 10. Vide infra Ch. 5. s. 2.

[c] 4 Inst. 73.

[d] 4 Inst. 73. Dy. 286, pl. 45.

[e] Keilw. 152. b.

[f] Keilw. 153.

[g] 3 Inst. 24. 4 Inst. 73. H. P. C. 156, 157.

Sect. 12. As to the fourth Point, What Rules are to be observed in the Form of the Proceedings of this Court, it seemeth, That all Process upon [h] Writs of Appeal, and also all Process upon [i] Indictments removed hither by *Certiorari* from a foreign County, ought to be made returnable *coram*

[h] Co. Entries, 57. b. 58. b. 60. a.

[i] Co Entries, 354. b. 355. b. 356. b. 358. a.

coram nobis ubicunque fuerimus, but that all Proceſs upon [a] Bills of Appeal againſt one *in cuſtodia Mareſchalli*, and perhaps alſo upon [b] Indictments commenced in the King's Bench, ought to be returnable *coram nobis apud Weſtmonaſterium*: Alſo it has been [c] reſolved, That where the Court proceeds on an Offence committed in the ſame County wherein it ſits, the Proceſs may be made returnable immediately; but that where it proceeds on an Offence removed by *Certiorari* from another, there muſt be fifteen Days between the *Teſte* and Return of every Proceſs.

[a] Co. Entries, 52. a. b 58. b. 60 a.
[b] Co. Entries, 352 a. 353. b. 361. a. Con. Co. Entries, 300. a. 363. a.
[c] 9 Co. 118. b. Co Lit. 134. b. 1 Lev. 61. 1 Sid. 72, 2 Rol. Ab. 626. pl. 4, 5. 2 Inſt. 550, 568.

CHAP. IV.

Of the Court of the Conſtable and Marſhal.

FOR the better underſtanding the Nature of this Court, it may not be improper to premiſe ſome general Conſiderations concerning the ancient Juriſdiction of thoſe high Officers before whom it is holden.

Sect. 1. As to the Office of High Conſtable of *England*, which anciently was hereditary, the ſame being eſteemed of too high Authority to be ſafely intruſted with any Subject, but only *pro hac vice*, ſince the Reign of King *Henry* the eighth, and there being very little to be found in our ancient Records and Hiſtories, concerning the particular Power or Authority of this high Officer, our moſt learned Antiquaries ſeem to be able to give us little more than their own Conjectures concerning this Matter. However there is no Doubt, but that he was an Officer of very great Power both in War and Peace; and indeed his very Name imports no leſs, for the Word Conſtable ſignifying in general a Commander or Officer, he who was called Conſtable of *England*, or the King's Conſtable, or ſometimes, by way of Eminency, the Conſtable, without any other Addition, cannot but be thought to have been a Perſon of the higheſt Command and Authority; and the Statute of 13 *R.* 2. (which is at large ſet forth in the following Part of this Chapter,) reſtraining his Juriſdiction to Things touching War, not determinable by the Common Law, in relation to which it requires him to proceed according to ancient Uſage, clearly ſuppoſes him to have an ancient eſtabliſhed Authority concerning theſe Matters: And it ſeems to have been ſomewhat doubtful, before the making of the ſaid Statute, Whether the Conſtable and Marſhal had not a general Juriſdiction over all Contracts whatſoever made beyond-ſea.

Dy. 285. b. 4 Inſt. 127.
Madox *Hiſtory of the* Exchequer, *fol.* 27, 28, 29.
Madox, 27.
Madox, 28.
48 E. 3, 3. 13 H. 4 4, 5.

Sect. 2. Neither do there ſeem to be any greater Footſteps in Antiquity, of the original Inſtitution of the Office of the Lord Marſhal, or of his Power, or Authority; for anciently there were ſeveral Officers of the King's Houſhold, who were called Marſhals, as the Marſhals of his [a] Horſes, of his [a] Birds, and of his [a] Meaſures, who had certain Salaries allotted them, for the Management or well ordering of the Things committed to their Charge. And in the ancient Records relating to thoſe Officers, there ſeems no more to be meant by having the Marſhalſy of a Thing, than to have the Overſight, or Charge, or Ordering of it: Alſo in our old Records, there are ſome Officers taken Notice of by the Name of Marſhals, who are mentioned only in general to have been Servants of the King's Houſhold, without any farther Account of the Nature

[a] Madox, 30.
Madox, 30, 31.
Madox, 29, 30.

1 Rol. Ab. 527. K.

ture of their Office, or Duty in particular. However, we find that in the 22d Year of King *Edw.* 3. the Parliament granted Fifteenths on divers Conditions, one of which was, That there ſhould be no Mareſchalſy in *England*, except the Mareſchalſy of the King, and of the Guardian of *England*, when the King ſhall be out of *England*. And it ſeems clear, That there was one Marſhal ſuperior to the reſt, who was ſometimes called the Maſter-Marſhal, at other Times the King's Marſhal, the Marſhal of *England*, or the Earl Marſhal, being an Officer of very great Authority both in War and Peace, whoſe principal Office in [a] Time of War, was to regulate the Incampments of the Army, and to aſſign to the Troops their reſpective Poſts in the Day of Battel; and in [b] Time of Peace, to provide for the Security of the King's Perſon in his Palace, to diſtribute the Lodgings there, and to preſerve Peace and Order in the King's Houſhold, and to be aſſiſtant to the Conſtable in determining Cauſes, and alſo to [c] execute the Orders both of the Court of the Conſtable, wherein he himſelf ſat as Judge, and of the [d] Court of the High Steward, to which he ſeems to have been only an Officer.

Madox, 31, 32, 33.

[a] Fleta. Lib. 2. Ca. 4. Co. Lit. 74.

[b] Madox, 33.

[c] 4 Inſt. 123. *Caſes in Parliament*, 60.

[d] Fleta, Lib. 2. Ca. 3.

Sect. 3. But whatever might be the original Inſtitution of theſe Officers, or the Nature of their Authority, it is certain their Juriſdiction is at preſent declared, limited and reſtrained by certain Acts of Parliament, before the making whereof, we have ſcarce any Thing memorable on Record concerning this Matter.

Madox, 29.

Sect. 4 And firſt it is enacted by 8 *R.* 2. 5. as followeth, *Becauſe divers Pleas concerning the Common Law, and which by the Common Law ought to be examined and diſcuſſed, are of late drawn before the Conſtable and Marſhal of* England, *to the great Damage and Diſquietneſs of the People: It is agreed and ordained, That all Pleas and Suits touching the Common Law, and which ought to be examined and diſcuſſed at the Common Law, ſhall not hereafter be drawn or holden by any Means before the foreſaid Conſtable and Marſhal, but that the Court of the ſame Conſtable and Marſhal ſhall have that which belongeth to the ſame Court, and that the Common Law ſhall be executed and uſed, and have that which to it belongeth, and the ſame ſhall be executed and uſed, as it was accuſtomed to be uſed in the Time of King* Edward.

Sect. 5. And it is farther declared by 13 *R.* 2. 2. in the following Words, *Becauſe that the Commons do make a grievous Complaint, that the Court of the Conſtable and Marſhal hath incroached to him and daily doth incroach Contracts, Covenants, Treſpaſſes, Debts and Detinues, and many other Actions pleadable at the Common Law, in great Prejudice of the King, and of his Courts, and to the great Grievance and Oppreſſion of the People: Our Lord the King, willing to ordain a Remedy againſt the Prejudices and Grievances aforeſaid, hath declared in this Parliament, by the Advice and Aſſent of the Lords Spiritual and Temporal, the Power and Juriſdiction of the ſaid Conſtable, in the Form that followeth: To the Conſtable it pertaineth to have Cognizance of Contracts touching Deeds of Arms and of War out of the Realm, and alſo of Things that touch War within the Realm, which cannot be determined nor diſcuſſed by the Common Law, with other Uſages and Cuſtoms to the ſame Matters pertaining, which other Conſtables heretofore have duly and reaſonably uſed in their Time. Joining to the ſame, That every Plaintiff ſhall declare plainly his Matter in his Petition, before that any Man be ſent for to anſwer thereunto. And if any will complain, That any Plea be commenced before the Conſtable and Marſhal, that might be tried by the Common Law of the Land, the ſame Plaintiff ſhall have a Privy-Seal of the King without Difficulty, directed to the ſaid Conſtable and Marſhal, to ſurceaſe in that Plea, until it be diſcuſſed by the Kings Council, if that Matter ought of Right to pertain to that Court, or otherwiſe to be tried by*

by the Common Law of the Realm of England, *and alſo that they ſurceaſe in the mean Time.*

Sect. 6. And it is farther enacted by 1 *H.* 4. 14. as followeth, *For many great Inconveniences and Miſchiefs, that often have happened, by many Appeals made within the Realm of* England *before this Time, it is ordained and ſtabliſhed from henceforth, That all the Appeals to be made of Things done within the Realm, ſhall be tried and determined by the good Laws of the Realm, made and uſed in the Time of the King's noble Progenitors; and that all the Appeals to be made of Things done out of the Realm, ſhall be tried and determined before the Conſtable and Marſhal of* England *for the Time being: And moreover, it is accorded and aſſented, That no Appeal be from henceforth made, or in any wiſe purſued in Parliament in Time to come.*

For the better underſtanding of the Conſtruction of theſe Statutes, and the Nature of this Court, I ſhall examine the following Particulars:

1. How far the ſaid Court hath Conuſance of Points of Honour in general.
2. Whether it can puniſh private Perſons for marſhalling Funerals.
3. Whether it can be holden by a Lord Marſhal alone without a Conſtable.
4. Whether its Power as to Appeals of Treaſon be ſuperſeded by 26 or 35 *H.* 8. or 5 and 6 *Ed.* 6. 11. or 1 and 2 *Ph.* and *Mar.* 10.
5. By what Law, and in what Manner it proceeds.
6. Whether it may be prohibited if it exceeds its Juriſdiction.
7. Whether it can be holden by Commiſſion.

Sect. 7. As to the firſt Point, it is obſervable, That the above mentioned Statute of 13 *R.* 2. declares the Juriſdiction of this Court, in Relation to Things done within the Realm in theſe Words, *To the Conſtable pertaineth Conuſance*, &c. *of Things that touch War within the Realm, which cannot be determined nor diſcuſſed by the Common Law*: From whence it ſeems to follow, That this Court has nothing to do with a mere Civil Matter, no way relating to War, and therefore the Proceedings of the Court of the Lord Marſhal, in the Time of King *Charles* the firſt, for bare ſcandalous Words, reflecting on the [a] Honour or Gentility of Families, ſeem no way to be maintained; yet it ſeems to be taken for granted in ſome [b] Books, That Diſputes concerning Precedency, and Points of Honour, and Satisfaction therein, are proper for this Court: Neither do I find, That the Proceedings therein againſt Perſons for falſly aſſuming the Name and Arms of honourable Families, were cenſured or diſallowed by the [c] learned Members of the Committee of the Houſe of Commons in the Year 1639. who were appointed to inquire into the Abuſes of this Court. And it ſeems to be [d] admitted in the Argument of *Oldis*'s Caſe, That all Matters of this Nature are proper for this Court; yet it ſeems to be a large Interpretation to make theſe Things relate to War, ſo as to come within the Declaration above mentioned; and the Rule laid down in [e] *Rolle*'s *Reports*, that the Marſhal has Power given him where the Common Law gives no Remedy, ſeems no way maintainable from the ſaid Statute; for it doth not ſay in general, That to the Conſtable pertaineth Conuſance of Things, which cannot be determined by the Common Law, but of Things of War, *&c.* which cannot be thereby determined; [f] neither is it a concluſive Argument, that a Matter which is remedileſs by the Common Law, muſt have a Remedy from ſome other Law; yet inaſmuch as by the Preamble of the ſaid Statute,

[a] Ruſhworth's Coll. Part 2. Vol. 2. 1055, 1056.
[b] Hob. 121. 1 Rol. Re. 87. 2 Lev. 134. Show. 353. 1 Sid. 353. 1 Lev. 230.
[c] Ruſhorth's Coll. Part 2. Vol. 2. 1055, 1056.
[d] *Parliament Caſes*, 64, 65.
[e] 1 Rol. Re. 87.
[f] 13 H. 4. 4. b. 5. 2.

tute, its chief Intention appears to be to prevent Incroachments on the Common Law; and ſuch Proceedings in Matters whereof the Common Law hath no Conuſance, cannot be ſaid any way to incroach upon it: And inaſmuch as the ſaid Statute is wholly declarative, and hath no negative Words; and the conſtant Practice, which is the beſt Interpreter of Laws, and the general Opinion of Lawyers ſeem to countenance ſuch Proceedings, I ſhall not take upon me to determine how far they may be warrantable.

1 Lev. 230. 1 Sid. 353. Show. Rep. 353.

Sect. 7. As to the ſecond Point, *viz.* Whether this Court can puniſh private Perſons for Marſhalling Funerals; though it ſhould be granted, That the Marſhalling publick Funerals belongs to the Heralds, who are Attendants on this Court, and that no other Perſons without their Licence can lawfully intermeddle herein; yet it does by no Means follow, That the Marſhal has Power to puniſh thoſe who ſhall be guilty of any ſuch Incroachment; but the proper Remedy ſeems to be by Action on the Caſe at Common Law, and not by a Suit in this Court, which by the above mentioned Statutes of 8 and 13 *R.* 2. has Cognizance only of ſuch Matters, which cannot be determined nor diſcuſſed by the Common Law: And this ſeems to be the principal Reaſon of Dr. *Oldis*'s Caſe, wherein a Suit in the Marſhal's Court againſt one *Donmille*, for taking upon him without Licence to paint Arms and Eſcutcheons, and cauſing them to be fixed to Herſes, and providing and lending Palls for Funerals, and painting Arms for one who had no Right to their Uſe at the Funeral, and marſhalling ſeveral Funerals, *&c.* was prohibited by the Court of Exchequer, upon great Deliberation, with the Advice of the reſt of the Judges, and the Judgment was afterwards confirmed by the Houſe of Lords.

Caſes in Parliament, 58, *&c.*

Sect. 8. As to the Third Point, *viz.* Whether this Court can be holden by the Lord Marſhal alone without the Conſtable, it was ſtrongly inſiſted in the [a] Arguments made uſe of in Dr. *Oldis*'s Caſe, That the Lord Marſhal cannot hold this Court without the Conſtable; and this was alſo the Opinion of the [b] above mentioned learned Committee of the Houſe of Commons in the Year 1639. And it is certain, That all our ancient [c] Law-Books and [d] Reports, which ſpeak of this Court, ſpeak of it either as the Court of the Conſtable and Marſhal, or of the Conſtable [e] only; and it is obſervable, that the above mentioned Statute of 13 *R.* 2. which in the Preamble ſpeaks of this Court, as the Court of the Conſtable and Marſhal, in the Body of the Act mentions the Conſtable only. And it is farther remarkable, That where-ever the Conſtable is mentioned together with the Marſhal, as Judge of this Court, he is always put before him; which ſeems to intimate, that he is look'd upon as the principal Judge of it: And it is agreed by [f] all, That the Marſhal cannot determine an Appeal of Death, or Treaſon, without a Conſtable; but on the other Side it may be argued, That the Reaſon why an Appeal of a capital Matter neceſſarily requires a Conſtable as well as Marſhal, is, becauſe 1 *H.* 4. which orders how ſuch an Appeal ſhall be brought, is expreſs, That it ſhall be tried and determined before the Conſtable and Marſhal of *England* for the Time being; whereas the other Statutes only provide againſt the Incroachments of this Court, and do not mention in what Manner or before whom it ſhall be holden; but they ſeem to refer ſuch Queſtions to ancient Uſage; ſo that if [g] before theſe Statutes the Court was uſually holden before the Conſtable and Marſhal jointly and ſeverally, [h] according to the common Uſage of other Courts, which generally may be holden before one Judge in the Abſence of

[a] *Caſes in Parliament*, 65, 66.
[b] Rushworth's Coll. Pt. 2. Vol. 2. 1056.
[c] S. P. C. 65. Cromp Juriſdiction, 82. 2 Inſt. 51 3 Inſt. 123. Co. Lit. 261. a. 391. b.
[d] 13 H. 4. 46. 37 H. 3. 5. a. 48 E. 3. 3. b. 37 H. 6. 20. b. 21. a.
[e] 30 H. 6. 6. G. 13 H. 4. 5. a.
[f] 1 Inſt. 74. b. Rushworth's Coll. Pt. 2. Vol. 1. 107, 112, *&c.* *Caſes in Parliament*, 61. 1 Lev. 230. Hutton, 3.
[g] *Caſes in Parliament*, 60, 61.
[h] *See* Ch. 1. S. 10.

of the reſt, it ſeems a reaſonable Conſtruction of the ſaid Statutes to allow this Court ſtill to be ſo holden; neither is it probable, That the Lord Marſhal upon the Extinguiſhment of the hereditary Office of the Conſtable, ſhould from Time to Time in the [a] Reigns of King *Henry* the eighth, Queen *Elizabeth*, and King *James* the firſt, hold this Court by himſelf without any Conſtable, and alſo often be aſſiſted therein by the Judges of the Common Law, unleſs it were then well known, that ſuch his Proceeding was warranted by the ancient and eſtabliſhed Uſage of his Court; and it is very extraordinary, That our Judges and Lawyers ſhould [b] generally take it as a Thing granted, that the Marſhal is at this Day the proper Judge of Points of Honour, *&c.* if it were imagined that he has no Power to act without the Concurrence of a Conſtable.

[a] *Caſes in Parliament*, 60, 61.
4 Inſt. 126.

[b] Hob. 121.
1 Rol. Re 87.
2 Lev. 134.
Show. 353.
1 Sid. 353.
1 Lev. 230.

Sect. 9. As to the fourth Point, *viz.* Whether the Power of this Court as to Appeals of Treaſon, be ſuperſeded by the Statutes of 26 *H.* 8. 13. or 35 *H.* 8. 2. or 5 and 6 *Ed.* 6. 11. or 1 and 2 *Ph.* and *Mar.* 10. it is obſervable that it is enacted by the ſaid Statutes of *H.* 8. and *Ed.* 6. *That all manner of Treaſons*, &c. *done out of this Realm ſhall from thenceforth be inquired, heard and determined before the Juſtices of the King's Bench, or before Commiſſioners*, &c. *in like Manner, to all Intents and Purpoſes, as if they had been done in the ſame Shire wherein they ſhall be inquired of*, &c. And it is enacted by the ſaid Statute of 1 and 2 *Phil.* and *Mar.* 10. *That from thenceforth all Trials for any Treaſon, ſhall be had and uſed only according to the due Order and Courſe of the Common Law*: Yet it hath been adjudged, That none of theſe Statutes take away the Juriſdiction of this Court in Relation to ſuch Treaſon: For the ſaid Statutes of *H.* 8. and *Ed.* 6. being wholly in the Affirmative, and it being their chief Intention to ſupply a Defect in the Common Law, which had provided no Method for the Trial of ſuch Offences by Jury, they ſhall not without expreſs Words be conſtrued to take away the Authority of an ancient Court, confirmed by Parliament; and therefore the above mentioned Expreſſion, That all ſuch Treaſons ſhall be tried by the King's Bench, *&c.* ſhall be taken to purport no more than that the King's Bench, *&c.* ſhall have Authority to try them; and as to the 1 and 2 *Ph.* and *Ma.* the plain Import thereof, ſeems to be to reſtore the ancient Manner of Trial by the Courſe of the Common Law to all Treaſons within its Juriſdiction, which had been much altered by ſome Statutes in the former Reigns, and this is fully ſatisfied by aboliſhing all Innovations, in the Proceedings at Common Law, and has no Relation to Caſes no way within its Conuſance.

Caſes in Parliament 62.
Roſhworth's Coll. Part 2. Vol 1. 107.
4 Inſt. 124.

Ruſhworth's Coll. Part 2. Vol 1. 107.
Dyer 131. pl. 75.
3 Inſt. 24.
4 Inſt. 124.

Sect. 10. As to the fifth Point, *viz.* By what Law and in what Manner this Court proceeds, there is no Doubt but that it ought to follow its own Cuſtoms and Uſages ſo far as they go, and in Caſes omitted the Rules of the [a] Civil Law: And becauſe this is not a Court of Common Law, a [b] Condemnation in it for a capital Offence cauſes neither Forfeiture of Lands nor Corruption of Blood; neither can an Error in its Proceedings be remedied by Writ of Error, but only by Appeal to the King: And yet the Judges of the Common Law take Notice of the Juriſdiction of this Court, and give Credit to a Certificate of its Judges, for the Trial of an [d] Iſſue concerning its Proceedings; [d] for the Civil Law is as much the Law of the Land, in ſuch Caſes wherein it has been always uſed, as the Common Law is in others.

[a] 3 Inſt. 125.
2 Inſt. 51.
1 Inſt 261.
37 H 6. 3. b.
20 b.

[b] 3 Inſt. 125
Ruſhworth's Coll. Part. 2. Vol. 1. 107, 113, *&c.*
Caſes in Parliament, 62.

[d] 2 Inſt. 51.
[c] 3 Inſt. 125, 341.
Caſes in Parliament 62.

Sect. 11. It is queſtioned, Whether the [e] King have any Remedy in this Court againſt an Offender, by way of Indictment or Information by the Attorney-General.

[d] 30 H. 6. 6 b.
37 H. 6. 3. b.
20 b. 21. a.
[e] Hutt. 3.

Sect. 12. As to the ſixth Point, *viz.* Whether this Court may be prohibited if it exceeds its Juriſdiction, it is expreſsly reſolved in *Oldis's* Caſe, That the ſaid Court being holden before the Lord Marſhal only, may be prohibited by the Courts of the Common Law if it exceed its Juriſdiction, and it is ſtrongly inſiſted on in the Argument of that Caſe, That the Court of the Conſtable and Marſhal, may alſo be prohibited; but there having been no Court holden before a Conſtable and Marſhal for theſe many Years, and there ſeeming to be ſmall Likelihood of its being revived, I ſhall refer the Reader for the farther Examination of this Matter to the learned Sir *Bartholomew Shower's* Report of the ſaid Caſe.

Caſes in Parliament 61,65.

Sect. 13. As to the ſeventh Point, *viz.* Whether the ſaid Court can be holden by Commiſſion; it ſeems to be the better Opinion of the Court in *Parker's* Caſe, That during the Lunacy of an Earl Marſhal, it may well be holden before Commiſſioners deputed to exerciſe his Office; and it ſeems hard to ſay, That ſuch Commiſſions, founded on the plain Neceſſity of the Caſe, and intended to prevent a Failure of Juſtice, as to Caſes of which no other Court hath Conuſance, are againſt the Purview of the Petition of Right, made in the third Year of the Reign of King *Charles* the firſt; which, complaining that Commiſſions had been granted for the Trial of certain capital Offences and other Outrages, by the Martial Law, under Pretence whereof divers of the King's Subjects had been put to Death, prays that from thenceforth no Commiſſions of like Nature might iſſue forth to be executed as aforeſaid.

1 Lev. 230.
1 Sid. 353.

CHAP. V.

Of the Court of the Juſtices of Oyer *and* Terminer.

FOR better underſtanding of the Nature of the Courts of the Juſtices of *Oyer* and *Terminer* and Gaol Delivery, I ſhall premiſe ſome Conſiderations concerning them in general, and then conſider the Nature of each of them in particular.

Sect. 1. But in the firſt Place, it may not be improper to remark, That the Prerogative authorizing theſe or any other Juſtices, is inſeparably united to the Crown, not only by the Common Law, but alſo by Statute, to which Purpoſe it is enacted by 27 *H.* 8. 24. *That no Perſon or Perſons, of what Eſtate, Degree, or Condition ſoever they be, ſhall have any Power or Authority to make any Juſtices of Eyre, Juſtices of Aſſize, Juſtices of Peace, or Juſtices of Gaol Delivery: But that all ſuch Officers and Miniſters ſhall be made by Letters Patent under the King's Great Seal, in the Name and by the Authority of the King's Highneſs, in all Shires, Counties Palatine,* Wales, &c. *or any other his Dominions,* &c. *any Grants, Uſages, Allowance, or Act of Parliament to the contrary notwithſtanding.*

Lamb. B. 1. ch. 5.
Co. Lit. 114.
1 Lev. 219.

As to what belongs to Juſtices of *Oyer* and *Terminer*, and Gaol Delivery in general I ſhall examine:

1. By what Kind of Inſtruments they muſt be conſtituted.
2. How their Authority may be ſuſpended, revived or determined.
3. How

3. How far the precise Letter of their Commissions must be observed by such Justices.
4. What Form is to be observ'd in the Adjournment of such Commissions.
5. How far the Power given by them, may be extended by other Commissions to other Justices, or committed to fewer than were appointed by the former.
6. Whether such Justices can sit in one County to try Offences in another.
7. Where their Records are to be kept after they are determined.
8. Whether the same Justices at the same Time may execute both Commissions.

Sect. 1. As to the first Point, *viz.* By what Kind of Instrument such Justices must be constituted; it seems to be laid down as a general Rule in some of the old Books, That though a Justice may be discharged by Writ under the Great Seal, yet that he cannot be made a Justice by such Writ, but only by [a] Commission: And it seems to be holden, both by [b] Sir *Edward Coke* and Sir [c] *Matthew Hale*, If any such Justices have their Authority by Writ, though made in the same Form and Words, that a legal Commission ought to have, yet their Proceedings are void; and yet it seems, That nothing more is meant by these Expressions, if strictly examined, than that all such Justices must derive their Authority from such Instruments as are of a known, stated, and allowed Form, warranted by ancient Precedents; and 'tis only a Dispute of Words, whether such Instruments are to be called Writs or Commissions; for if you take the Import of the Word *Writ* from [d] *Finch*'s Definition of it, who says, That it is a *Latin* Letter of the King's, from his higher Courts of Record, in Parchment, sealed with his Seal, and *tested* by him, it seemeth that the most approved Forms of Commissions of *Oyer* and *Terminer*, &c. may well enough come under the general Notion of Writs, which by the last mentioned [e] Author are divided into Writs Original and Commissional: And accordingly we find, That Commissions of *Oyer* and *Terminer*, Association, and *si non omnes*, granted upon special Occasions, are called Writs both by the [f] Register, and also by [g] *Fitzherbert*, who yet seems not to approve of this general Notion of the Word *Writ*, and says, that these Commissions should not properly be called Writs. Also it is said, by Sir *Edward Coke* in his Comment on the Statute of *Westminster*, the second, Ch. 32. which mentions the Writ of *Oyer* and *Terminer*, that Commissions were anciently granted by Writ, by which he seems to imply, That they are otherwise granted at this Day; but he doth not tell us the Distinction between a Writ and Commission; neither can I find that the modern Precedents differ from the old ones; but on the contrary, that it hath always been agreed, That it is the safest Way to follow the old ones: But I must confess, That I cannot find a certain Instance from any [h] Book of Authority, wherein general Commissions of *Oyer* and *Terminer* are called Writs. However, as to the Resolutions of the Judges in 42 *Ass. pl.* 12, 13. which are but briefly and obscurely reported, and yet seem to be the chief Foundation of what is said in the later Books relating to this Matter, the Authority thereof seems to amount to no more than these two following Points: First, That Justices appointed by Commission to hear and determine certain Offences, cannot receive an additional Power by Writ directing them to inquire of other Offences; and this seems to be the Sense of [i] *Staundford* and [k] *Fitzherbert*

[a] Long. Quinto. Ed. 4. 13. 27. b. 42 Ass. pl. 12, 13. Bro. Ass. 384. Commission, 16, 18. Indictment, 22, 38. 29 Finch 247.
[b] 4 Inst. 164.
[c] H.P.C. 161.
[d] Finch 237. *See* Theloal's *Digest of Originals*, 1. b. 2. b.
[e] Finch, 312, 318. *See* Theloal, 2 b.
[f] Register. 123. b. 124 b.
[g] F.N.B. 110, 111. Cromp. Jurisdiction, 131.
[h] Vide infra, Sect. 33.
[i] S P.C. 94. A.
[k] Fitz. Enditement, 7. *See* Br. Commission 16, 18. Indictment, 22, 38, 39.
[c] 12 Co. 31.

herbert in relation to this Matter. [a] Secondly, That Writs impowering Persons to inquire of Offences, without anthorizing them also to determine them, are illegal, except in such Cases wherein they are allowed by ancient Usage, as were [b] Writs of this Kind to Sheriffs before the Statute of 28 *E.* 3. 9. And therefore where it is generally said in some [c] Books, That Commissions have been directed to certain Persons to inquire of certain Offences, in order to have them afterwards tried before other Justices, it seems that it ought to be understood, that such Commissions were in the common Form of Commissions of *Oyer* and *Terminer*, though they be spoken of only as Commissions of Inquiry As to the Resolution in the *Long* [d] *Quinto* of *Edward* the fourth, which is the other principal Authority concerning this Matter, the Import thereof seems to be no more than this, That a Person cannot legally be associated to Justices of Assize, by a Writ directed to such Justices, reciting a Commission of Association to such Person, and commanding the Justices to receive him, unless there be also produced a Commission of Association directed to such Person; for that the King cannot make a Justice by such Writ directed to others; by which it seems to be implied, That by a proper Writ he may do it. And it is certain, That the Commission of Association directed to the Party himself, is called a Writ both by the [e] Register, [f] *Fitzherbert*, and [g] *Finch*, and also by [h] Sir *Edward Coke*, as well as the Writ of Admittance directed to the other Justices. However it seems clearly to be agreed by all these Books, That the best Rule of judging of the Validity of any such Commissions, is their Conformity to known and ancient Precedents, and this seems to be the best Reason of the Resolution in 1 *And.* 296. wherein it is adjudged, That a Commission to a Corporation, appointing some of its principal Members to be Justices of Gaol Delivery, together with those whom the King should appoint from Time to Time, was void: For such an Authority depending on the precarious Appointment of other Justices, is not agreeable to the known Forms of such Commissions; but the other Reason given in that Book, for such newly appointed Justices not joining with the former, because their Authority commences at several Times seems not conclusive; for the Authority of Justices, appointed by Writ of Association, is of a subsequent Commencement from that of the Justices in the first Commission; and yet it is certain, That such may act jointly together, as will more fully appear in the following Chapter.

Sect. 2. As to the second Point, *viz.* How the Authority of such Justices may be suspended, revived or determined, there is no Doubt, but that their Power is wholly suspended by the Court of King's Bench sitting in the same County for which they are commissioned, during the Time of such sitting, especially if they have Notice thereof, as hath been more fully shewn *Chap.* 3. *Sect.* 10. and it seems, That their Jurisdiction is revived of Course, when the said Court no longer sits there, without any Writ of *Procedendo*, *&c.* Also it is certain, that their [h] Authority may be suspended by a Writ of *Supersedeas*, which is grantable on Proof that their Commission was unduly granted, in which Case their Power may be restored by a Writ of *Procedendo*, without any new Commission. But a Commission once determined, cannot be revived by any Writ of *Procedendo*, nor the Justices authorized anew without another Commission.

[a] 12 Co. 31.

[b] Register, 121. S. P. C. 84.

[c] 1 And. 106. *See* Pl. Com. 390.

[d] Fol. 111. 112. 29 b. 137, 138.

[e] Register, 124. b. F. N. B. 111.

[f] Finch, 318.

[g] 4 Inst. 107.

[h] Register, 124, 125. 12 Ass. 21. 4 Inst. 163. H. P. C. 162.

Sect.

Sect. 3. Such Commissions may be determined expresly or impliedly; expresly, by an absolute Repeal or Countermand from the King; impliedly, several Ways. 4 Inst. 163.

Sect. 4 First, by the Demise of the King by whom they were granted; but this Mischief is in a great Measure obviated by late Statutes, as hath been more fully shewn, *Ch.* 1. *sect.* 11, 12, 13.

Sect. 5. Secondly, According to some Opinions, by the Justice's Acceptance of any new Name of Dignity, as of that of Duke, Knight, or Serjeant, *&c.* But this is remedied by 1 *Ed.* 6. 7. by which it is enacted, *That if any Person being in any of the King's Commissions whatsoever, shall fortune to be made or created Duke, Archbishop, Marques, Earl, Viscount, Baron, Bishop, Knight, Justice of the one Bench or of the other, or Serjeant at Law, or Sheriff, yet that notwithstanding he shall remain Commissioner*, &c. But it hath been questioned, Whether the Dignity of a Baronet which has been created since that Statute, be within the Equity of it? Bro. Commission. 4, 22. Cro. Ca. 104. Lit. Rep. 81.

Sect. 6. Thirdly, By holding a Session without adjourning it, if the Commission have no Time limited for its Continuance; as where it is appointed *pro hac vice* only; but if it be granted for a certain Time, or *quamdiu nobis placuerit*, it does not necessarily require any Adjournment; and therefore, if the Court holden by Vertue of such Commission, break up without any Adjournment, or upon a void one, as being made without the Consent of the Majority of the Commissioners, yet it may be holden again on a new Summons. Crom. Jur. 125. b. H. P. C. 161. 4 Inst. 165. Bro. Commission. 12. Dalis. 24, 25. Vide Dyer 205. pl. 5. 4 Inst. 165. 1 Leon 270.

Sect. 7. Fourthly, By granting a new Commission to other Persons of the same Nature with the former, though but for Part of the District for which the former was granted, as some say: And whether [a] such new Commission be for a certain Time, or *pro hac vice* only; yet the former Commissions shall remain [b] in Force, so far as they are consistent with the later; and therefore it seems certain, that a Commission of the Peace is not determined, as to its Authority relating to the Peace, by a new Commission to hear and determine Felonies. But it hath been [c] holden, That it is determined as to its Authority relating to Felonies; but this seems justly questionable, not only as being contrary to common Practice, but also becaufe Justices of the Peace, as such, seem to have Authority by 34 *E.* 3. to hear and determine Felonies, without any special Clause in their Commission, for that Purpose, as will more fully be shewn *Ch.* 8. But it seems certain, That a Commission of [d] Gaol-Delivery shall not be determined by a new Commission of *Oyer* and *Terminer*, becaufe they are of different Natures. [e] Also it seems to be clear not only from 2 *&* 3 *Ph. & Mar.* 18. set forth more at large, *Sect.* 12. but also in Cases not within the Statute, that a Commission of the Peace for a certain Town determines not the Authority of the Corporation, having a Grant from the King, That the Mayor and his Successors shall be Justices of the Peace within its Limits, becaufe such a Grant is irrevocable. [f] Also it seems certain, That no new Commission doth determine an old one, unless the former Commissioners have Notice of it. Crom. Jur. 125. b.

[a] Bro. Commission 7.

[b] Bro. Commission. 8, 24.

[c] Bro. Commission. 8.

[d] Bro. Commission. 24.

[e] Bro. Commission. 5.

[f] H. P. C. 162. 4 Inst. 165. 34 Ass. 8. Bro Commission 6, 14.

Sect. 8. Such Notice may be given expresly or impliedly; expresly, by [g] shewing the new Commission to the former Commissioners, which certainly determines the Power of all those to whom it is shewn; impliedly, two manner of Ways.

Sect. 9. I. By [h] holding a Session by Force of the new Commission, which seemeth to be agreed to be a Matter so notorious, that the first Justices shall be presumed to have Notice of it.

[g] H P. C. 162. 4 Inst. 165. Dyer 355. pl. 36.

[h] 34 Ass. 8. Bro. Commission. 14. Moor. 186. pl. 333. Keilw. 116.

H. P. C 162. 4 Inst. 165. Bro. Commission, 6. Keilw. 116.

Sect. 10. II. According to the general Opinion, by proclaiming the new Commission in the County.

Sect. 11. As the Authority of the Justices appointed by any former Commission, is determined by the Grant of a new one in the Manner abovementioned, so likewise were all Proceedings before such Justices discontinued at the Common Law; to remedy which Inconvenience it was enacted by 1 *Ed.* 6. 7. Par. 6. *That no manner of Process, or Suit made, sued, or had before any Justices of Assize, Gaol-Delivery, Oyer and Terminer, Justices of Peace, or other of the King's Commissioners, shall not in any wise be discontinued by the making and publishing of any new Commission or Association, or by altering the Names of the Justices of Assize, Gaol-Delivery, Oyer and Terminer, Justices of Peace, or other the King's Commissioners, but that the new Justices of Assize, Gaol-Delivery, and of the Peace, and other Commissioners, may proceed in every Behalf, as if the old Commissions, Justices and Commissioners, had still remained and continued not altered.*

1 Sid. 348. 2 Keb. 292. Bro. Coro. 178.

Sect. 12. And it farther enacted by 2 *&* 3 *Ph. & Mar.* 18. *That all and singular Commissions granted to any City or Town-Corporate, not being a County in it self, for the keeping of their Peace, and Delivery of the Prisoners remaining in the Gaols of any such City or Town-Corporate, shall stand, remain, and be good, and available and effectual in the Law, to all Intents, Constructions and Purposes, the granting of any like Commission of Peace or Gaol-Delivery, to any Commissioner or Commissioners for the Conservation of the Peace, or Delivery of the Prisoners remaining in the Gaol of any Shire, Lathe, Rape, Riding, or Wapentake within the Realm of* England, *bearing Date after the said Commission or Commissions granted as is aforesaid, to any such City or Town-Corporate, not being, as aforesaid, a County in it self, to the contrary notwithstanding.*

Dalis. 25.

Sect. 13. As to the third Point, *viz.* How far the precise Letter of such Commissions must be observed by the Justices, it is said to be agreed, That if a Commission of *Oyer* and *Terminer, &c.* be awarded to certain Persons to inquire at such a Place, they can neither open their Commission at another, nor adjourn it thither, nor give Judgment there; and that if they do, all their Proceedings shall be esteemed as *coram non judice:* Yet it is agreed, That Justices appointed by Commission *pro hac vice*, may adjourn their Commission from one Day to another, though there be no Words in their Commission to such Purpose; for nothing can be more reasonable, than to intend that a general Commission authorizing Persons to do a Thing, does implicitly allow them convenient Time for the doing of it.

12 Ass pl. 21. Crom. Jur. 126. Long. quinto E. 4. 133. a. Dalis. 25. 3 Inst. 31. H. P. C. 160. Bro. Commission, 18. Kelynge 57.

Sect. 14. As to the fourth Point, *viz.* What Form is to be observed in the Adjournment of such Commissions, having already in the foregoing Part of this Chapter, in the 6th and 13th Sections, incidentally treated of the principal Questions relating to this Matter, I shall only take Notice in this Place, That it seems most proper to [a] enter all such Adjournments in the Present Tense; yet it is said, That the Entry of of them in the Preter-Tense, is made good by the Multitude of Precedents: [b] However it is said, That the Court will never intend that there was an Adjournment, if no Entry at all were made of it.

[a] Raym. 115.

[b] 1 Sid. 348. 2 Keb. 284, 292.

Sect. 15. As to the fifth Point, *viz.* How far the Power given by such Commissions, may be extended by new ones to other Justices, or committed to fewer than were appointed by the former; it is certain, That new Commissioners of this Kind may be added to the former, by a Writ or Commission of Association, which setting forth the Purport of the former Commission, declares the King's Pleasure to associate to the Persons, appointed by the first, those to whom such new Writ or Commission

sion is directed, provided that such new Justices attend at the Times and Places appointed by the former; and it is usual to direct another Writ to the former Justices, commanding them to admit such new Justices as their Associates with the Proviso abovementioned; and the Writ to the Persons so associated is always Patent, and that to the other Justices to admit them is Close. But it hath been [a] resolved, That the first Justices are not bound by such Writ to admit the Persons named in it as their Associates, unless they produce such Patent of Association as is abovementioned directed to themselves, as hath been more fully shewn in the first Section of this Chapter. And it hath been [b] questioned, Whether a special Commision of Association, relating only to a particular Cause, can associate the Persons named in it to Justices appointed by a general Commission? Also it hath been holden, That the King can grant but one Patent of Association to one Commission.

Register 124. F.N.B. 111. B. Finch 318, 319. H.P.C. 159, 162. [a] 4 Inst. 165. [a] Long. quinto E. 4. 137. [b] Long. quinto E 4. 111, 112, 130, 131. Fitz. Assize 17. 32 H. 6. 10.

Sect. 16. If after Justices have sate by Vertue of a Commission, and taken divers Indictments, and awarded Process thereon, they shall all, or some of them die, the King may grant a new Commission to those who are living only, or to others, commanding them to continue the Proceedings begun, and to proceed upon such Process, and to hear and determine all the Offences in the former Commission: And thereupon the King shall send a Writ unto the Executors of the Justices who are dead, to send the Rolls, Records, and Processes touching the Premisses, before the new Commissioners, *&c.*

Register 128. F.N.B. 111. D. 113, 114.

Sect. 17. After a VVrit of Association, it is usual to make out a Writ of *si non omnes*, directed both to the first Justices, and also to those who are so associated to them, which reciting the Purport of the two former Commissions, commands the Justices, That if all of them cannot conveniently be present, such a Number of them may proceed, *&c.*

Register 124. F.N.B. 111.

Sect. 18. As to the sixth Point, *viz.* Whether such Justices may sit in one County to try Offences in another? it seems agreed, That regularly all Offences are to be inquired of, heard, and determined in the County wherein they were committed, and that the King cannot authorize the taking of them in another; yet it was adjudged in the Case of the City of *Gloucester*, That if the King grant to a City the Privilege of being a County of it self, distinct from the County within which it lies, with a *Salvo* or Reservation, That the Justices of *Oyer* and *Terminer*, *&c.* for the County at large, may still sit in such City, such Reservation makes the City still remain Part of the County for such Purpose, and consequently, that an Indictment found within such City, of an Offence in the County at large, is good. Also it is certain, That by a special Custom, Indictments of Offences within a County, may be taken in a Place out of it; as they are in Fact taken both for *Middlesex* and *London* at the Sessions-Hall at *Newgate*, which stands in *London*; for it shall be intended, That at the original Division of *London* from *Middlesex*, there was a special Provision made for this Purpose. Also it is certain, That the King may grant a special Commission of *Oyer* and *Terminer*, to sit in one County for hearing and determining Offences, whereof Indictments have been found in another: But it is agreed, That the Trial must be by the Jurors of the proper County.

3 Inst. 27. H.P.C. 162, 163. Dy. 286. pl. 45. Poph. 16, 17. 1 And. 291, 292. 3 Inst. 27. H.P.C. 162, 163. Dy. 286. pl. 45. Raym. 193. Popham 17. 3 Inst. 27. H.P.C. 162, 163. Dy. 286. pl. 45. Pl.Com. 390.

Sect. 19. As to the seventh Point, *viz.* Where the Records of such Justices are to be kept after they are determined, it is enacted by 9 *Ed.* 3. 5. *That Justices of Assize, Gaol-Delivery, and of Oyer and Terminer, shall send all their Records and Processes determined and put in Execution, to the Exchequer at* Michaelmas, *every Year once, to be delivered there; and the Treasurer*

14 H 7. 15 b.

surer and Chamberlains, which for the Time shall be, having the Sight of the Commissions of such Justices, shall receive the same Records and Processes of the said Justices under their Seals, and keep them in the Treasury, as the Manner is; so that the Justices always do first take out the Estreats of the said Records and Processes against them, to send to the Exchequer as they were wont before.

9 H 7. 9. a. b. Bro. Commission, 17, 24. Crom. Jur. 126. b. H. P. C. 160. Fitz. Coro. 47. 9 H. 7. 9.

Sect. 20. As to the eighth Point, *viz.* Whether the same Justices at the same Time may execute both the Commission of *Oyer* and *Terminer*, and also that of Gaol-Delivery? It seems certain at this Day, That the same Persons being authorized by both these Commissions, may proceed by Vertue of the one in those Cases, wherein they have no Jurisdiction by the other, and execute both at the same Time, and make up their Records accordingly; but this doth not seem to have been clearly agreed in former Times.

And now I am to consider the Nature of each of the abovementioned Commissions in particular; and first of that of *Oyer* and *Terminer*, concerning which I shall endeavour to shew;

1. Its several Kinds.
2. To what Cases the Jurisdiction given by it doth extend.
3. To whom, and on what Occasions it is grantable.

As to the first Point, these Commissions are of two Kinds:

1. General.
2. Special.

4 Inst. 162, 163. Crom. Jur. 131. Pl. Com. 384. b. 2 Inst. 419. Register 123.

Sect. 21. At this Day the common Form of such a General Commission, is to authorize the Persons to whom it is directed, or three or four of them, of which Number either such or such particular Persons among them are specially appointed to be, to inquire by the Oaths of lawful Men, and by other Means, of all Treasons, Felonies, and Misdemeanors, being specially mentioned, and of all others, in such and such Counties, and to hear determine the same at certain Days and Places to be appointed by them, *&c.* For which Purpose the King acquaints them, That he hath sent a Writ to the Sheriffs of such Counties, commanding them to return a Jury before them, at such Days and Places as shall be notified by them, in order to make Inquiries of such Offences, *&c.*

34 Ass. pl. 8. 42 Ass. pl. 5. 2 Inst. 419.

Sect. 22. It is observable, That the abovementioned Commission makes no mention of the Suit of the Party; but it seems to have been anciently the most common Form of such Commissions to direct the Justices to hear and determine Offences, as well at the Suit of the Party as of the King.

Of Special Commissions of *Oyer* and *Terminer*, there are many Precedents in our ancient Law Books; as first,

[a] Regist. 123. F. N. B. 110.

Sect. 23. 1. [a] For the inquiring and determining of some particular enormous Violence done to the Party, at whose Complaint the Commission is sued.

[b] Register 125, 127. F. N. B. 112, 113.

Sect. 24. 2. [b] Or for inquiring and determining of Trespasses done to the Possessions of a Bishoprick, while the Temporalities were in the King's Hands.

[c] Register 126. F. N. B. 112. *Letter* C.

Sect. 25. 3. [c] Or for inquiring and determining of Injuries offered to Merchants, *&c.* under Pretence that their Ships were wrecked.

Sect.

Sect. 26. 4. Or for inquiring and determining of Oppreſſions of Under-Sheriffs and Bailiffs, and other Officers; after which the King may ſend a Writ to the High Sheriff, commanding him as far as in him lies, to remove ſuch Perſons from their Offices till ſuch Inquiries be made. Regiſter 126. F. N. B 112. *Letters* D. E.

Sect. 27. 5. Or for inquiring into the Want of Reparations of Sea-Walls, Ditches, Gutters, Sewers, Bridges, *&c.* Regiſter 127, 128. F. N. B. 113.

Sect. 28. 6. For hearing and determining the Right and Title of certain Perſons claiming an Office, *&c.* Yet we find in *Dyer*, That the Defendant, ſued before ſuch Commiſſioners, demurred to the Juriſdiction of the Court; and it ſeems not to be clearly ſettled there whether ſuch Commiſſion be good. Crom. Jur. 132. Dyer 175. pl. 25, 26.

Sect. 29. It is obſervable, That ſome of theſe ſpecial Commiſſions are mentioned to be granted at the Complaint of the [a] particular Perſons ſuppoſed to be aggrieved; others at the Complaint of [b] divers Perſons in general without naming them, and [c] others without any Complaint at all. 2 Inſt. 419. [a] Regiſter 123. a. 125. a. b. 126. a. 127. a. [b] Regiſter 125. b. [c] Regiſter 127. a.

Sect. 30. Alſo there are Precedents of other Commiſſions of like Nature, granted on particular Occaſions: But ſuch ſpecial Commiſſions having been of late much diſuſed, I ſhall refer the Reader for a more exact Knowledge of them to the *Regiſter*, and *Fitzherbert's Natura Brevium*.

Sect. 31. As to the ſecond Point, *viz.* To what Caſes the Juriſdiction given by the Commiſſion of *Oyer* and *Terminer* doth extend; it is generally ſaid, That the Juſtices have no Power from it to proceed againſt any Perſons, but thoſe who are indicted before themſelves, becauſe the Words of it are, That they ſhall inquire hear, and determine; by which it ſeems to be implied, That they muſt inquire of an Offence before they proceed to hear and determine it: But this Reaſoning depending wholly on the Wording of general Commiſſions, which are made in ſuch Form, doth by no Means prove that a ſpecial Commiſſion of *Oyer* and *Terminer*, reciting an Indictment of a particular Perſon, and authorizing the Juſtices to ſend for and proceed upon it to try the Offender, is not good; and accordingly we find, That the Attainder of *Dudley*, afterwards Earl of *Leiceſter*, by Vertue of ſuch a Commiſſion, was not objected againſt on this Account, in the Arguments concerning it, reported at large in *Plowden's Commentaries*. Bro Commiſſion. 24. 4 Inſt. 164. H. P. C. 161. 12 Co. 32. Crom. Jur. 131, 132. Plow. Com. 385, 386, *&c.*

Sect. 32. It ſeems to be [a] agreed, That where a Statute prohibits a Thing, and does not appoint in what Court it ſhall be puniſhed, the Offender may be indicted before Juſtices of *Oyer* and *Terminer*, becauſe the King hath a Prerogative of ſuing in what Court he will. But it hath been [b] adjudged, That if ſuch Statute appoint that the Offence ſhall be determined in any of the King's Courts of Record, it can be proceeded againſt only in one of the Courts of *Weſtminſter-Hall*; becauſe thoſe being the higheſt Courts of Record, ſhall be intended to be only ſpoken of *ſecundum excellentiam*; and if the Act ſhould be taken literally to intend any Court of Record whatſoever, the Sheriff's Turn, Court-Leet, and Pie-powders, and all other inferior Courts of Record, would be within the Purview of it: And it is farther reaſonable to conſtrue the Statute to extend to the ſaid Courts of *Weſtminſter* only, becauſe the King's Attorney always attends there, whoſe Office it is, if the Defendant plead a ſpecial Plea to make a Replication; yet both Sir *Edward Coke* and Sir *Matthew Hale* ſeem to be of Opinion, That on a Statute ſo worded, the Proſecution may be in any Court of *Oyer* and *Terminer*. And indeed ſeeing the abovementioned Limitation of ſuch Suits to Courts of Record, is no more than the Law would have implied, if it had not been expreſ- [a] Dy. 236. pl. 24. Crom. Jur. 132. 4 Inſt. 164. [b] Dy. 236 pl. 24. 6 Co. 19. b. 20. a. Cro Jac. 538. Cro. Eliz. 737. Cro. Ca. 146. Salk. 178. 4 Inſt. 164, 165. H. P. C. 161.

sed: And it is agreed, That if it had not been expressed, the Suit might be in any Court of *Oyer* and *Terminer*, it may be reasonably argued, that it may be brought in any such Court notwithstanding such Limitation, according to the common Maxim, *quod expressio eorum quæ tacitè insunt, nihil operatur*; especially considering that the Court holden before Justices of *Oyer, &c.* is a Court of Record of a very high Nature, and much regarded by the Law. And as to the Objection, That the Construction contended for, would extend such Suits to all inferior Courts of Record, it may be answered, that it would only extend them to such Courts of a general Jurisdiction, wherein Suits of like Nature may properly be brought, and not to Courts of a limited Authority, instituted for special Purposes, and confined either to Offences at the Common Law, as the Court-Leet and Sheriff's Turn are, or to Contracts of a special Nature, as the Court of Pie-powders is: As to the Objection, That it is most reasonable to construe the Statute, to intend only such Courts wherein the King's Attorney attends, the same may be said in Relation to Prosecutions on Statutes, which mention no Court at all wherein they shall be brought; and yet it seems to be certain, That such Prosecutions may be brought in any Court of *Oyer* and *Terminer*: Neither do I find any Reason assigned, why the King's Prerogative, of choosing in what Court he will commence a Suit, should be restrained without express Words in this Case, where Courts are mentioned in general, more than in the others where they are not mentioned at all. Besides it ought to be considered, That if such Prosecutions are to be confined to the Courts of *Westminster*, no Offence against any such Statute in any County, but that wherein the King's Bench sits, could be indicted at all; for it is certain, That no Offence can be inquired of out of the County wherein it was committed: Also since 21 *Jac.* 1. 4. set forth more at large in the Chapter concerning *Informations*, which restrains all Prosecutions whatsoever on Penal Statutes to their proper Counties, (as the Construction of the said Statute is now settled,) if Suits on such Statutes could be brought only in *Westminster-Hall*, no Offences out of *Middlesex* could be prosecuted at all.

Fitz. Essoign. 173.

Dy. 236. pl. 24.

Sect. 33. As to the third Point, *viz.* To what Persons, and on what Occasions, Commissions of *Oyer* and *Terminer* are grantable, it is enacted by the Statute of *Westminster* 2. Chap. 29. *That a Writ of Trespass*, (ad audiendum & terminandum,) *from henceforth shall not be granted before any Justices, except Justices of either Bench, and Justices in Eyre, unless it be for an heinous Trespass, where it is necessary to provide speedy Remedy, and our Lord the King of his special Grace hath thought it good to be granted.*

Sect. 34. And it is farther enacted by 2 *E.* 3. Ch. 2. *That Oyers and Terminers shall not be granted but before Justices of the one Bench or the other, or the Justices Errants, and that for great Hurt or horrible Trespasses, and of the King's Special Grace, after the Form of the Statute abovementioned.*

Sect. 35. Also it is enacted by 34 *Ed.* 3. 1. *That Writs of Oyer and Terminer be granted according to the Statutes thereof made, and that the Justices which shall be thereto assigned, be named by the Court, and not by the Party.*

Sect. 36. It may perhaps be argued from the general Words of these Statutes, That no Commission of *Oyer* and *Terminer* ought to be granted to any, but such Justices as are therein mentioned, and on such special Occasions. And Sir *Edward Coke* in his Comment on the said Statute of *Westminster* 2. does not shew whether all such Commissions in general are meant to be restrained by it, or such only as are of a particular Nature; yet if the Intention of the said Statutes be fully examined, it seems reasonable to confine the Purview of them to special Commissions of *Oyer* and

2 Inst. 418.

and *Terminer*, granted at the Complaint of particular Persons, upon some great Injury suggested to have been done to them; not only for that such special Commissions, for redressing of a particular Grievance at the Suit of the Party, seem to come more properly and generally under the Notion of Writs, than general Commissions issued by the King as the common Dispenser of Justice to his People, without any particular Application from, or Regard to any particular Person; but also because there may be a Mischief to the Subject from such special Commissions, which cannot be feared from the general ones; for the Party who sues out such a special Commission, may thereupon take out a Writ to the Sheriff, commanding him to arrest the Goods supposed to be wrongfully taken away, and to keep them in safe Custody till some Order be made concerning them, by the Justices assigned to determine the Matter, which may be very inconvenient to the Person complained of: Neither can it be imagined, That the Statute intended to restrain general Commissions to enormous Trespasses, which could not but hinder the due Execution of Justice, which requires the Punishment of all Kinds of Misdemeanors, of which such Commissioners are the usual and proper Judges. But it is reasonable indeed, That such special Commissions should not be granted but upon urgent Occasions; and accordingly we find Precedents for the superseding of them, where the King has been informed, that he was imposed upon in granting them on a Suggestion, that the Injury complained of was of a heinous Nature, where in Truth it was but a slight inconsiderable Trespass.

Theolal's Digest. of Writs 1, 2. & supra Sect. 1.
2 Inst. 419.
Register 126, 127.
2 Inst. 419.
F.N.B. 112. f.
Register 124, 125.
12 Ass. pl. 21.

For other Particulars concerning the Proceedings of Justices of *Oyer* and *Terminer*, see the Chapter concerning *Approver*, and the Chapter concerning *Process against the Jury*.

CHAP. VI.

Of the Court of the Justices of Gaol-Delivery.

FOR the better understanding of the Nature of the Commission of Gaol Delivery, I shall consider,

1. What ought to be the Form of it.
2. What Jurisdiction the Justices authorized by it have by the Common Law.
3. What by Statute.
4. In what Place they ought to hold their Sessions.

Sect. 1. As to the first Point, having already shewn that all judicial Commissions must be agreeable to ancient Precedents, I shall only shew in this Place, the Purport of the most usual Commission of Gaol-Delivery, which is a Patent in Nature of a Letter from the King to certain Persons, appointing them his Justices, or two or three of them, of which Number either such or such a particular Person among them is especially required to be, and authorizing them to deliver his Gaol, at such a Place, of the Prisoners in it; for which Purpose it commands them to meet at such Place, at the Time which they themselves shall appoint, and

Chap. 1. *from* Sect. 4 *to* Sect 9. *and* Chap. 5. Sect. 1.
4 Inst. 168. Cromp. Ju. 125.

and informs them, That for the ſame Purpoſe the King hath commanded his Sheriff of the ſame County, to bring all the Priſoners of the ſame Gaol, and their Attachments before them, at ſuch Day to be appointed by them.

Sect. 2. As to the ſecond Point, *viz.* What Juriſdiction Juſtices of Gaol-Delivery have by the Common Law; it ſeems to be clear, That they may by Common Law proceed upon any Indictment of Felony or Treſpaſs, found before other Juſtices, againſt any Perſon in the Priſon mentioned in their Commiſſion, and not determined; and therefore thoſe Words in the Statute of 4 *E.* 3. Ch. 2. *That the Juſtices aſſigned to deliver the Gaols ſhall have Power to deliver the ſame Gaols of thoſe that ſhall be indicted before the Juſtices of Peace*, ſeem only to be in Affirmance of the Common Law; and herein the Authority of theſe Juſtices differs from that of Juſtices of *Oyer* and *Terminer*, who regularly can proceed only againſt Perſons indicted before themſelves, as hath been more fully ſhewn in the precedent Chapter, *Sect.* 31.

H. P. C. 158. 4 Inſt. 168, 169. Bro. Coron. 179. 12 Co. 32.

Sect. 3. But it is ſaid in ſome [a] Books, That Juſtices of Gaol-Delivery, as ſuch, have no Power to take any Indictment; but the common Opinion, that they have ſuch Power, ſeems much more agreeable to Reaſon; for [b] ſurely it cannot but be implied in their Commiſſion to deliver Priſons of their Priſoners, That they muſt have Authority to make ſuch Deliverance by due Courſe of Law, which cannot be without a Proclamation, if there be no Proſecution, or a proper Trial if there be one, in Order to which there muſt be an Accuſation of Record, without which the Priſoner cannot be arraigned or tried.

[a] Cro. Eliz. 90, 179. Bro. Commiſſion 24. 1 And. 111. Fitz. Coron. 47.
[b] 1 And. 111. 112. H. P. C. 158. 4 Inſt. 168.

Sect. 4. Alſo it hath been [c] holden, That Juſtices of Gaol-Delivery, as ſuch, have no Power to deliver the Gaol of Perſons committed for High Treaſon, perhaps for this Reaſon, becauſe this being a Crime of ſo high a Nature, and againſt the King himſelf, ſhall not be included in the general Words of a Commiſſion, nor tried without the King's ſpecial Direction; and this Opinion ſeems to be much favoured by the Preamble of the Statute of 3 *H.* 5. Ch. 7. wherein it is recited, *That the Puniſhment of counterfeiting Money*, (which is a Species of Treaſon,) *pertaineth not to any Judges of the Realm, but to the King's Juſtices before himſelf, or to ſpecial Commiſſioners thereto aſſigned*; and thereupon it is enacted, *That Juſtices of Aſſiſe ſhall have Power by the King's Commiſſion to hear and determine the Offence abovementioned*: Yet the contrary Opinion is not only warranted by very great [d] Authorities, but alſo ſeems to be more agreeable to Reaſon; for ſince the Words of the Commiſſion are general, and include all Priſoners alike without any Exception, why ſhould thoſe who are accuſed of Treaſon, be conſtrued to be out of the Meaning of them more than others? eſpecially conſidering, That the greater the Crime is for which a Man is impriſoned, the greater Hardſhip it is for him to lie under the Terror of a Proſecution for it, without being admitted to an Opportunity of clearing his Innocence; And the Statute of 1 *Ed.* 6. 7. which authorizes ſubſequent Commiſſioners of Gaol-Delivery, to give Judgment of Death againſt ſuch as were found guilty before other Commiſſioners of Gaol-Delivery, of Treaſon, *&c.* and reprieved before Judgment, clearly ſuppoſes ſuch Juſtices to have Power in Treaſon as well as in other Caſes.

[c] S. P. C. 183. *Letter* A. 2 Rol. Rep. 12. Crom. Jur. 28. Fitz. Coron. 47. 1 And. 111.
[d] 4 Inſt. 169. H. P. C. 159. 1 And. 112 *and the next* Ch. Sect. 4.

Sect. 5. It ſeems clear from the Words of the Commiſſion, That theſe Juſtices have nothing to do with any Perſons not in Cuſtody of the Priſon mentioned in it, except in ſome ſpecial Caſes; for if Part only of thoſe who were Accomplices to the ſame Felony be in ſuch Priſon, and other Part of them out of it; ſuch Juſtices for the Neceſſity of the Caſe, may

Fitz Coron. 77.

may [a] receive an Appeal against those who are out of the Prison, as well as those who are in it; which Appeal after the Trial of such Prisoners, shall be removed into the King's Bench, and Process shall issue from thence against the rest: But if those out of Prison should be omitted in such Appeal, they could never be put into any other, because there can be but one Appeal for one Felony. Also it is said both by [b] *Staundford*, and [c] *Hale*, That such Justices may receive an Appeal by Bill against one let to Bail. But I cannot find any Authority in the [d] Books, cited by them for that Purpose, to warrant this Opinion; for though it be true, That the Court of King's Bench may receive an Appeal by Bill, against one for whom Bail is filed, as being *in Custodia Mareschalli*; yet this seems to depend on the particular Usage of that Court. And I do not find it said in any Book, That those who are bailed by any other Court, are looked upon as Prisoners in the Prison belonging to such Court, but only in the Custody of their Sureties, who may detain them where-ever they please: However, it seems to be agreed by all the Books abovementioned, That such Justices have no more to do with one let to Mainprize, than if he were at large, because such Person can in no Sense be said to be a Prisoner, since it is not in the Power of his Sureties to detain him in their Custody, as will be more fully shewn in the Chapter concerning *Bail*.

[a] 9 H. 4. 1. b. 4 Co. 47. b. S. P. C. 64. D.

[b] S. P. C. 64. C. D.

[c] H. P. C. 132.

[d] 32 H. 6. 4. a. 39 H. 6. 27. b. 9 H. 4. 2. a. 13 H. 4. 10. b. 21 H. 7. 33. a. Fitz. Mainprize 12, 13. Dy. 99. pl. 62. Bro. Appeal 11, 19, 51, 123.

Sect. 5. It seems clear, That such Justices have not only Power to discharge such Prisoners, as upon their Trial shall be acquitted; but also all such against whom, upon Proclamation made, no Evidence shall appear to indict them; which neither Justices of Peace, nor Justices of *Oyer* and *Terminer* can do.

4 Inst. 167. Fitz. Coron. 47. H. P. C. 158.

Sect. 6. Also there seems to be no Doubt, but that the Justices of Gaol-Delivery may award Execution, against such Prisoners as have been outlawed for Felony before Justices of Peace.

15 H. 7. 5. b. 4 Inst. 169. H. P. C. 158.

Sect. 7. Also notwithstanding the Commission of Justices of Gaol-Delivery be in Strictness determined after the End of their Session, yet it seems to be settled at this Day, That they have Power either to order the Execution or Reprieve, of the Persons who have been condemned before them.

Dyer 205. pl. 5. H. P. C. 160. cont. Cromp. Jur. 126. *Quære* S. P. C. 132. *Letter* B.

Sect. 8. Also it is said by some, That the Justices of Gaol-Delivery may by the Common Law punish those who unduly bail Prisoners, as being guilty of a negligent Escape; but it seems needless strictly to examine this Matter, since they have certainly such Power by Statute, as will be more fully shewn in the following Part of this Chapter.

S. P. C. 77. a. 25 E. 3. 39. a.

As to the third Point, *viz.* What Jurisdiction Justices of Gaol-Delivery have by Statute, I shall consider the same,

1. In Relation to Appellees.
2. To irregular Bailment of Prisoners.
3. To Sheriffs, *&c.* refusing to receive Prisoners.
4. To Persons convicted before former Justices.
5. To Offences created by Statute.

Sect. 9. As to the first Particular, it is enacted by 28 *E.* 1. *That they may award Process into a foreign County against those who shall be appealed before them by an Approver*, as shall be more fully shewed in the Chapter concerning *Approvers*.

Sect. 10. As to the ſecond Particular, *viz.* The Power of ſuch Juſtices in Relation to the Bailment of Priſoners, it is enacted by 27 *Ed.* 1. *cap.* 3. commonly called the Statute *De finibus*, *That Juſtices of Aſſiſe ſhall deliver the Gaols of Counties where they take Aſſiſes*, &c. *and inquire if Sheriffs or any other, have let out by Replevin Priſoners not repleviable, or have offended in any Thing contrary to the Form of the Statute of* Weſtminſter, 1 Cap. 15. *and whom they ſhall find guilty, they ſhall chaſten and puniſh in all Things according to the Form of the Statute aforeſaid.*

F. N. B. 251. H. H. P. C. 158. 3 Inſt. 169.

Sect. 11. But this Statute mentioning only Juſtices of Aſſiſe, it may perhaps be queſtioned, whether it is to be extended by Equity, to Juſtices of Gaol-Delivery by ſpecial Commiſſion, not being Juſtices of Aſſiſe.

Sect. 12. However, it is enacted by 4 *Ed.* 3. *cap.* 2. *That Juſtices aſſigned to deliver Gaols, ſhall have Power to enquire of Sheriffs, Gaolers, and other in whoſe Ward Perſons indicted before Wardens of the Peace ſhall be, if they make Deliverance, or let to Mainprize any ſo indicted, which be not mainpernable, and to puniſh the ſaid Sheriffs, Gaolers and others, if they do any Thing againſt this Act.*

Sect. 13. It is obſervable, that this Statute ſaith only in general, That ſuch Juſtices ſhall have Power to puniſh the Offenders therein mentioned, without ſaying, That they ſhall puniſh them according to the Form of the Statute of *Weſtminſter* 1. as the abovementioned Statute *de finibus* does; yet it is ſaid, That they may puniſh them according to the Form of the ſaid Statute of *Weſtminſter*, as much as if it had been expreſſed.

S. P. C. 77. a.

Sect. 14. Alſo it is enacted by 1 *&* 2 *Ph. & Mar.* 13. *That if any Juſtice of the Peace of the* Quorum, *or Coroner, ſhall offend againſt the Purview of the ſaid Statute, either as to bailing Priſoners, or taking their Examinations, or the Information of thoſe that bring them before them, or not putting the ſame in Writing, or not certifying them to the next Gaol-Delivery, or not putting in Writing the Evidence given to a Jury on a Coroner's Inqueſt of Murder or Manſlaughter, or not binding over material Witneſſes againſt Perſons accuſed of Felony, to give Evidence at the next general Gaol-Delivery, or not certifying ſuch Evidence, and alſo ſuch Recognizances*, &c *the Juſtices of Gaol-Delivery of the Place where ſuch Offence ſhall be committed upon due Proof thereof by Examination before them, ſhall for every ſuch Offence ſet ſuch Fine as they ſhall think meet*, &c.

Sect. 15. As to the third Particular, *viz.* The Power of ſuch Juſtices in Relation to Sheriffs, *&c.* refuſing to receive Priſoners, it is enacted by 4 *E.* 3. *cap.* 10. *That Juſtices of Gaol-Delivery ſhall puniſh Sheriffs and Gaolers, refuſing to take Felons into their Cuſtody from Conſtables and Townſhips, without being paid for ſuch Receipt.*

Sect. 16. As to the fourth Particular, *viz.* The Power of ſuch Juſtices, in Relation to Perſons convicted before former Juſtices, it is enacted by 1 *Ed.* 6. *cap.* 7. *That where any Perſon or Perſons ſhall be found guilty of any Treaſon or Felony, for the which Judgment of Death ſhould or may enſue, and ſhall be reprieved to Priſon without Judgment at that Time given againſt him, her, or them ſo found guilty, thoſe Perſons that at any Time hereafter, ſhall by the King's Letters Patent be aſſigned Juſtices to deliver the Gaol, where any ſuch Perſon or Perſons found guilty ſhall remain, ſhall have full Power and Authority to give Judgment of Death againſt ſuch Perſon ſo found guilty, and reprieved, as the ſame Juſtices, (before whom ſuch Perſon or Perſons was or were found guilty,) might have done, if their Commiſſion of Gaol-Delivery had remained and continued in full Force and Strength.*

Sect. 17. It hath been holden, That this Statute extends not to Convictions before Justices of *Oyer* and *Terminer*, not only because Convictions before Justices of Gaol-Delivery only are mentioned, but because the Proceedings before Justices of *Oyer* and *Terminer*, after the *Oyer* determined, ought to remain in the King's Bench, and the Records before the Justices of Gaol-Delivery with the *Custos Rotulorum.* 12 Co. 33. Bro. Oyer & Terminer.

Sect. 18. Also it seemeth, That since the Statute speaks only of Persons reprieved before Judgment, it gives subsequent Commissioners no Manner of Power over Persons condemned by former Justices; and therefore it hath been holden, That if a Person condemned by former Justices, plead a Pardon before their Successors, they have no Power to allow it, but that the Record ought to be removed by *Certiorari* into the King's Bench, and the Prisoner also by *Habeas Corpus*, and that there the Pardon shall be allowed or disallowed. And from the same Reason it seems to follow, That subsequent Justices have no Power from this Statute to award the Execution of Persons condemned by former Justices, and reprieved by them: But if Judgment had not been given by the former Justices, there is no Doubt but that the subsequent ones might by force of this Statute, have allowed the Pardon, or given Judgment, and awarded Execution, *&c.* as the first might have done. Also it hath been adjudged, That not only such subsequent Justices as are authorized by the same King by whom the former were commissioned, but also that the Justices of the next King have the like Power by Virtue of this Statute. Dalison 20. *Quare* Dy. 165. pl. 4. 7 Co. 31. b. Dalison 20.

Sect. 19. As to the fifth Particular, *viz.* The Jurisdiction of Justices of Gaol-Delivery in Relation to Offences created by Statute; By 33 *H.* 8. 9. Par. 20. They may punish those who keep unlawful Gaming-Houses, or use unlawful Games. By 5 *Eliz.* 9. Par. 9. They have Jurisdiction over Perjury and Subornation of Perjury against the Form of that Statute. By 8 *Eliz.* 3. They may punish those who transport Sheep alive. By 23 *Eliz.* 1. Par. 9. They may enquire of, hear and determine Offences against that Statute in not coming to Church; and generally they have the like Power in other Statutes, creating new Offences, which it would be too tedious particularly to set down in this Place.

As to the fourth general Point of this Chapter, *viz.* In what Place Justices of Gaol-Delivery ought to hold their Sessions, it is enacted by 6 *Ric.* 2. 5. *That Justices assigned to take Assizes and deliver Gaols, shall hold their Sessions in the principal and chief Towns of every of the Counties where the Shire-Courts of the same Counties were then holden, or hereafter should be holden.* For other Matters relating to these Justices, see Chapter 7. concerning *Justices of Assise and* Nisi Prius, and the Chapter concerning *Process.*

CHAP.

CHAP. VII.

Of the Court of the Justices of Assise *and* Nisi Prius.

Sect. 1. THE Power of Justices of Assise, whether as such, or as Justices of *Nisi Prius*, in Relation to criminal Matters, depending wholly on Statute, I shall only take Notice of the principal Branches of their Jurisdiction of this Kind, given them by several Acts of Parliament; and for more particular Inquiries concerning their Authority in other Cases, and the Nature, Extent, and End of their Commission shall refer the Reader to Sir *Edward Coke*'s *4th Institute, fol.* 158, *&c.* and to his *12th Report, fol.* 32. and to Mr. *Crompton*'s *Treatise concerning the Jurisdiction of Courts, fol.* 204. *&c.*

The most considerable Parts of their Jurisdiction in criminal Matters, proper to be considered in this Place, are such as relate,

1. To the Delivery of Gaols.
2. To Counterfeiters of Money.
3. To Appellees.
4. To Conspirators, Maintainers, and other Offenders of the like Nature.
5. To Offences of Sheriffs, Gaolers, and other Officers.
6. To capital Offences tried by Writ of *Nisi Prius*.
7. To the Counties for which such Justices of Assise may be commissioned.

Sect. 2. As to the first of these Particulars, it is enacted by 27 *Ed.* 1. commonly called the Statute *de finibus, cap.* 3. *That Justices assigned to take Assises, in every County where they do take Assises, as they be appointed incontinent after the Assises taken in the Shires, shall remain both together if they be lay; And if one of them be a Clerk, then one of the most discreet Knights of the Shire being associate to him that is a Layman by the King's Writ, shall deliver the Gaols of the Shires, as well within Liberties as without, of all Manner of Prisoners, after the Form of the Gaol-Deliveries of those Shires, before times used. And the same Justices shall inquire then, if Sheriffs or any other have let out by Replevin Persons not repleviable,* &c.

Sect. 3. Also it is recited by 2 *Ed.* 3, 2. *That Offenders had been greatly encouraged, because the Justices of Gaol-Delivery and of* Oyer *and* Terminer, *had been procured by great Men against the Form of the said Statute of* 27 *Ed.* 1. and thereupon it is enacted, *That such Justices shall not be made against the Form of the said Statute.*

S. P. C. 57. b. Raym. 375. H. P. C. 164. 12 Co. 32.

Sect. 4 It seems to have been the most general Opinion in the Construction of the abovementioned Statute of 27 *Ed.* 1. That the Purview of it extends only to Cases of Felony; and this is farther confirmed by the Recital of the Statute of 3 *H.* 5. set forth more at large in the following Part of this Chapter, by which it is declared, That no Judges but those of the King's Bench, or special Commissioners, have Power to punish Counterfeiters of Money. Also it is argued, That the Purview of the

S.P.C. 57,58.

the ſaid Statute of 3 *H.* 5. impowering Juſtices of Aſſiſe, having the King's Commiſſion for ſuch Purpoſe, to hear and determine the Offences of ſuch Perſons, would be vain and to no Purpoſe, if ſuch Juſtices, as ſuch, had Power over ſuch Offences before, by Virtue of the ſaid former Statute: And yet perhaps the contrary Opinion is the more plauſible; for ſince the ſaid Statute is intended for the greater Expedition of Juſtice, and the Words of it expreſly extend to all Manner of Priſoners, why ſhould they be reſtrained by a violent Interpretation, inconſiſtent with the natural and obvious Senſe of them? And ſince Juſtices of Gaol-Delivery, armed only with a general Commiſſion to deliver Gaols of the Priſoners in them, are, according to the better Opinion at this Day, authorized to deliver ſuch Gaols of Perſons accuſed of Treaſon, as well as of others committed for Crimes of an inferior Nature, why ſhould not the ſaid Statute, the Intent whereof is to give Juſtices of Aſſiſe like Power with Juſtices of Gaol-Delivery, be conſtrued to give them as large a Power? And as to the Arguments drawn from the Opinion of the Makers of the abovementioned Statute of 3 *H.* 5. it may be anſwered, That perhaps the Purport of the ſaid Recital may amount to no more than this, that no other Judges but thoſe therein mentioned, would venture to take upon them a Power to try ſuch Offences, becauſe it was not clearly ſettled that they had Authority to do it.

Vide infra ſect. 9.

Vide ſupra cap. 6. ſect. 4.

Sect. 5. It ſeems to be the general Opinion, That Juſtices of Aſſiſe, as ſuch, by force of the ſaid Statute of 27 *E.* 1. may deliver Gaols without any ſpecial Commiſſion for that Purpoſe; and this ſeems to be moſt agreeable to the Purview of the ſaid Statute, if ſuch Juſtices be Laymen; for ſeeing the Act provides only, That if one of them be a Clerk, then one of the Knights of the County being aſſociate by Writ to him that is a Layman ſhall deliver the Gaols; and makes no mention of any ſuch Writ where both are Laymen; but only ſays in general, That in ſuch Caſe they ſhall remain both together, it ſeems to imply that Laymen being Juſtices of Aſſiſe ſhall have ſuch Power of Courſe.

H. P. C. 164. S. P. C. 57. b. Crom Jur. 126. Dyer 99 pl. 62.

Sect. 6. As to the ſecond particular, *viz.* The Power of theſe Juſtices in Relation to Counterfeiters of Money, it is recited by the Statute of 3 *H.* 5. *cap.* 7. *That Counterfeiting, Clipping, Waſhing, and other Falſity of Money, had then of late abounded, for that the Puniſhment of the ſame pertaineth not to any Judges of the Realm, but to the King's Juſtices before himſelf, or ſpecial Commiſſioners thereto aſſigned,* &c. and thereupon it is enacted, *That the King's Juſtices aſſigned to take Aſſiſes in all the Counties of* England, *ſhall have Power by the King's Commiſſions, to hear and determine in their Seſſions, as well of the Counterfeiting and of the bringing ſuch falſe Money into the Realm, as of Clipping, Waſhing, and every other Falſity of the ſaid Money.*

See the precedent Chap. Sect. 4. *and the* 15*th* Sect. *of this Chapter.*

Sect. 7. It ſeems clear from the manifeſt Purport of this Statute, That Juſtices of Aſſiſe can claim no Power from it over any of the Offences therein mentioned, without a ſpecial Commiſſion for ſuch Purpoſe; but this Statute being wholly in the Affirmative, and no way intended to abridge but inlarge the Juriſdiction of ſuch Juſtices; It ſeems clear, That if they had Authority as Juſtices of Gaol-Delivery, by Vertue of the abovementioned Statute *De finibus*, without any ſpecial Commiſſion, to deliver Perſons in Priſon for ſuch Crimes, (which Queſtion is more fully handled in the precedent Part of this Chapter) they may ſtill lawfully proceed upon the ſaid Statute in the ſame Manner as before.

S. P. C. 58. H. P. C. 164.

Supra ſect. 4. Cro. Jur. 126.

Sect. 8. As to the third Particular, *viz.* The Power of Juſtices of Aſſiſe in relation to Appellees, it is enacted by 28 *Ed.* 1. commonly called the Statute *De Appellatis, That ſuch Juſtices may award Proceſs into any foreign County againſt Perſons appealed by Approvers, and proceed againſt them,* &c.

Dyer 99. pl. 62. 12 Co. 32.

Sect. 9. It is made a Doubt in *Dyer's Reports*, by what Warrant Justices of Assise hold Plea of an Appeal of Robbery; and it is there holden, That they do it by Vertue of the Commission of Gaol-Delivery: But it seems, that it ought not to be intended to be the Meaning of this Report, That Justices of Assise have no Jurisdiction as to an Appeal of Robbery, without an expres Commission of Gaol-Delivery; for since Justices of Assise, as such, have Power by the abovementioned Statute *De finibus* to deliver Gaols of all manner of Prisoners, after the Form of the Gaol-Deliveries of the Shires wherein they sit, why should they not by Force of those general Words, deliver such Gaols of Persons proceeded against by way of Appeal commenced before them, as well as of those proceeded against by way of Indictment, as it seems to be taken for granted in other Books that they may? And therefore it seems to be reasonable to take the abovementioned Report of *Dyer* in this Sense, That Justices of Assise may hold Plea of Appeals of Robbery by the Commission of Gaol-Delivery, given them implicitly by the said Statute *De finibus*, in respect whereof they seem to have all the Power of Justices of Gaol-Delivery, whether given them by the Common Law or by Statute, as fully appears from what immediately follows the abovementioned Passage in the said Report, wherein it is said, That the Statute of 2 or 3 *H.* 7. gives Justices of Assise the Power by expres Words as to Appeals of Death; but it is certain, that the said Statute of *H.* 7. does not expresly mention Justices of Assise, but saith only, That the Wife, *&c.* may commence an Appeal before the Sheriff and Coroners, or before the King in his Bench, or Justices of Gaol-Delivery; and yet it is holden in the said Report, That this Statute expresly extends to Justices of Assise; from which it seems manifestly to follow, That such Justices are taken to be included under the general Notion of Justices of Gaol-Delivery.

22 Ed. 4. 19. a. Bro. Appeal. 113. 4 Inst. 159. Dyer 99. pl. 62. 3 H. 7. ch. 1. 13 Co. 32. 4 Inst. 159.

Sect. 10. As to the fourth Particular, *viz.* The Power of Justices of Assise in relation to Conspirators, Maintainers, and other Offenders of the like Nature, it is enacted by 28 *Ed.* 1. commonly called *Articuli super chartas*, ch. 10. *That Justices assigned to take Assises, when they come into the Country to do their Office, shall upon every Plaint made unto them of Conspirators, false Informers, and evil Procurers of Dozens, Assises, Inquests, and Juries, award Inquests thereupon without Writ, and shall do Right to the Plaintiffs without Delay.* And it is farther enacted by 4 *Ed.* 3. 11. *That the Justices of Assise, whensoever they come to hold their Sessions, or to take Inquests upon* Nisi Prius, *shall inquire, hear, and determine, as well at the Suit of the King as at the Suit of the Party, of Maintainors, Bearors, Conspirators*, &c. And the like is ordained by 20 *Ed.* 3. 6. by which it is enacted, *That such Justices shall have Commissions to inquire of Maintainers and common Embraceors*, &c.

Register 188.

Sect. 11. Also it is enacted by 5 *Ed.* 3. 10. *That the Justices before whom any Assise, Inquest or Jury shall pass, may inquire and determine the Offence of any Juror in taking Money of either Party*, &c.

Sect. 12. But it is ordained by 38 *Ed.* 3. 12. *That no Justice*, &c. *inquire of Office of the said Offence, but only at the Suit of the Party, or of other*, &c.

Sect. 13. And it is farther enacted by 32 *H.* 8. ch. 9. *That the Justices of Assise of every Circuit within this Realm, and elsewhere within the King's Dominions, shall in every County within their Circuits, twice in the Year cause open Proclamation to be made, as well of the said Statute as of all others made against unlawful Maintenance, Champerty, Embracery*, &c.

Sect. 14. As to the fifth Particular, *viz.* The Power of Justices of Assise

Aſſiſe in Relation to the Offences of Sheriffs, Gaolers, and other Officers, it is enacted by 20 *Ed.* 3. 6. *That Juſtices of Aſſiſe ſhall have Commiſſions ſufficient to inquire of Sheriffs, Eſcheators, Bailiffs of Franchiſes and their Miniſters, and of the Gifts which they take to execute their Office,* &c.

Sect. 15. Alſo it is enacted by 23 *H.* 6. 10. *That Juſtices of Aſſiſes in their Seſſions, ſhall have Power to inquire, hear and determine of Office without ſpecial Commiſſion, of and upon all Sheriffs, Under-Sheriffs, Clerks, Bailiffs, Gaolers, Coroners, Stewards, Bailiffs of Franchiſes, or any other Officer or Miniſter doing contrary to the ſaid Statute, as by extorting Money for the omitting of an Arreſt, or ſhewing Eaſe or Favour to thoſe who ſhall be arreſted, or by admitting Perſons to Bail, or denying them the Benefit of it, contrary to the Form of the ſaid Statute.*

Sect. 16. Alſo it is enacted by 1 *H.* 8. 7. *That Juſtices of Aſſiſe and of the Peace, ſhall have Authority to inquire of and determine, as well by Examination as by Preſentment, the Defaults of Coroners in not taking an Inqueſt without Fee or Reward, on the View of the Body of any Perſon ſlain by Miſadventure.*

Sect. 17. As to the Sixth Particular, *viz.* The Power of Juſtices of Aſſiſe, in Relation to capital Offences tried by Writ of *Niſi Prius*, it is enacted by 14 *H.* 6. 1. *That the Juſtices before whom Inquiſitions, Inqueſts and Juries, ſhall be taken by the King's Writ of* Niſi Prius, *ſhall have Power in all the Caſes of Felony and Treaſon, to give their Judgments, as well where a Man is acquit of Felony or of Treaſon, as where he is thereof attainted, the Day and Place where the ſaid Inquiſitions, Inqueſts, and Juries be ſo taken, and then from thenceforth to award Execution to be made by Force of the ſame Judgments.* Raym. 367.

Sect. 18. In the Conſtruction of this Statute it hath been holden, That if the Plaintiff in Appeal be nonſuited before Juſtices of *Niſi Prius*, they have no Power to arraign the Defendant at the Suit of the King on the Declaration in the Appeal, as Juſtices before whom an Appeal is originally commenced may do: And the Reaſon of this Conſtruction ſeems to be this, becauſe the Statute only mentioning that Juſtices of *Niſi Prius* ſhall give Judgment where the Defendant is acquitted or attainted, leaves their Juriſdiction upon a Nonſuit as it was before. But it ſeems certain, That on the Acquittal of an Appellee ſuch Juſtices have Power to inquire of the Abettors, and alſo of the ſufficiency of the Plaintiff to anſwer the Damages; for ſince the Statute of *Weſtminſter* 2. Ch. 12. gives ſuch Power to the Juſtices before whom an Appeal ſhall be heard and determined; and now by Force of 14 *H.* 6. it may be heard and determined before Juſtices of *Niſi Prius*, it ſeems neceſſarily to follow, that Juſtices of *Niſi Prius* ſhall have ſuch Power ſince the ſaid Statute of 14 *H.* 6. And from the ſame Reaſoning it ſeems alſo to follow, That ſuch Juſtices may give Judgment for the Damages; but conſtant Experience hath over-ruled it to the contrary. 22 Ed. 4. 19. a. Dy. 120. pl. 12. Crom. Jur. 212. 4 Inſt. 160. 22 Ed. 4. 19. a. 10 Ed. 4. 14 b. 2 Inſt. 386. Bro. Niſi Prius 27.

Sect. 19. As to the ſeventh Particular, *viz.* For what Counties Juſtices of Aſſiſe may be commiſſioned, it is enacted by 8 *Ric.* 2. 2. *That no Man of Law ſhall be from thenceforth Juſtice of Aſſiſes, or of the common Deliverance of Gaols, in his own Country.*

Sect. 20. Alſo it is enacted by 33 *H.* 8. Ch. 24. *That no Juſtice, nor other Man learned in the Laws of this Realm, ſhall uſe, nor exerciſe the Office of Juſtice of Aſſiſe within any County where the ſaid Juſtice was born, or doth inhabit, on Pain of* 100 *l.* &c. *Provided that the ſaid Act ſhall not extend to any Perſon who ſhall be Clerk of Aſſiſes, and Aſſociate to any Juſtice of Aſſiſe, nor to any Mayor, Sheriff, Recorder, Steward, Bailiff, Sewter, or other Officer being born or dwelling within any City, Borough, or Town within this Realm of* England, &c. *Nor to Juſtices of either Bench for taking, hearing, or determining Aſſiſes in the one Bench or the other, nor to the Juſtices, Juſtice-Clerks, or Clerk of Aſſiſes, in the Dutchy and County Palatine of* Lancaſter.

CHAP.

CHAP. VIII.

Of the Court of Seſſions of Juſtices of Peace.

BEFORE I come to conſider the Nature of the Court of Seſſions of Juſtices of Peace, I ſhall premiſe,

1. In what Manner Conſervators of the Peace were provided by the Common Law.
2. In what Manner Juſtices of Peace have been ordained by the ſeveral Statutes concerning them.
3. How they are to be commiſſioned in Purſuance of thoſe Statutes.
4. What is moſt obſervable from the ſaid Statutes and Commiſſions.

As to the firſt Point it ſeems, that Conſervators of the Peace by the Common Law, were of two Sorts;

1. Thoſe who in reſpect of their Offices had Power to keep the Peace, but were not ſimply called by the Name of Conſervators of the Peace, but by the Name of ſuch Offices.
2. Thoſe who were conſtituted for this Purpoſe only, and were ſimply called by the Name of Conſervators or Wardens of the Peace.

[a] Lamb B. 1. Ch. 3. Dalt. Ch. 1. [b] Bro. Recognizance 14, 19. Dalt. Ch. 1. [c] Lamb B. 1. Ch. 3.

Sect. 1. And firſt of thoſe of the firſt Sort, of which the King's [a] Majeſty is certainly the Principal, from whom all Authority of this Kind was originally derived, and who ſtill continues to have the ſame in his own Perſon; yet it is ſaid, [b] That he cannot take a Recognizance for the keeping the Peace, becauſe it is a Rule in Law, that no one can take any Recognizance, who is not either a Juſtice of Record, or by Commiſſion; alſo it ſeems certain, That [c] no Duke, Earl, or Baron, as ſuch, have any greater Authority to keep the Peace than mere private Perſons.

[d] Dalt. Ch. 1. Lamb B. 1 Ch. 3. Crompt. 6. b.

Sect. 2. The [d] Lord Chancellor or Lord Keeper of the Great Seal, the Lord High Steward of *England*, the Lord Marſhal, and Lord High Conſtable of *England*, and every Juſtice of the King's Bench, and, as ſome ſay, the Lord Treaſurer, have, as incident to their Offices, a general Authority to keep the Peace throughout all the Realm, and to award Proceſs for the Surety of the Peace, and to take Recognizances for it. And the Maſter of the Rolls hath alſo the like Power, either as incident to his Office, or at leaſt by Preſcription.

[e] 10 H. 6. 7. b. Lamb B. 1. Ch. 3.

Sect. 3. Alſo every [e] Court of Record, as ſuch, hath Power to keep the Peace within its own Precincts, as hath been more fully ſhewn, *Ch.* 1. *Sect.* 15. And the Juſtices of Gaol-Delivery may take Surety of the Peace from a Priſoner before them, who was committed for not finding ſuch Surety.

Sect. 4. Also every Sheriff is a principal [a] Conservator of the Peace within his County, and may without Doubt, *ex Officio*, award Process of the Peace, and take Surety for it; and it seems the better [b] Opinion, That the Security so taken by him is by the Common Law looked on as a Recognizance or Matter of Record, and not as a common Obligation, or Matter *in Pais* only; for that it is taken by him by Vertue of the King's Commission, by which he is intrusted with the Custody of the County, and consequently has by it an implied Power of keeping the Peace within such County; and it is a general [c] Rule, That whatsoever is done by Vertue of the King's Commission ought to be taken as a Matter of Record.

[a] Lamb. B. 1. Ch. 3. 12 H. 7. 17. b. Bro. Peace 13 Cro. Car. 26.
[b] Bro. Recognizance 5. F.N.B. 81. d. 82. Dalt. Ch. 11. Lamb. B. 1. Ch. 13. *Quere* Bro. Recognizance 5, 14, 16, 18.
[c] *See the Books above cited.* 9 E. 4. 30. b. 31. a.

Sect. 5. Also every [d] Coroner is another principal Conservator of the Peace within the County of which he is a Coroner, and may certainly bind any Person to the Peace who makes an Affray in his Presence; But it seems the better Opinion, That he has no Authority to grant Process for the Peace; and it seems clear, That the Security taken by him for the keeping of the Peace, (except only where it is taken by him as Judge of his own Court for an Affray done in such Court,) is not to be looked on as a Recognizance, but as an Obligation; because it is not taken by one who acts as a Judge of Record, or by the King's Commission, as all [e] Recognizances ought to be.

[d] Cromp. 6. Lamb B. 1. Ch. 3.
[e] *See the Books cited* S. 1. *Letter* b *and* S. 4 *Letter* b.

Sect. 6. Also every High and Petit Constable are by the Common Law Conservators of the Peace within their several Limits, and may take such Order for the keeping of the same, as hath been more fully shewn, *B.* 1. *Ch.* 63. *S.* 13, 14, *&c.* Crompt. 6. b.

Secondly, Conservators of the Peace by the Common Law, who were constituted for that Purpose only, and were simply called by the Name of Conservators or Keepers of the Peace, were of two Kinds:

1. Ordinary.
2. Extraordinary.

Those of the first Kind were either,

1. By Tenure, or
2. By Election, or
3. By Prescription.

Sect. 7. Conservators of the Peace by Tenure were those who held Lands of the King by this Service, among others, of being Conservators of the Peace, within such a District. Lamb B. 1. Ch. 3.

Sect. 8. Conservators of the Peace by Election, were those who were chosen to such Office in Pursuance of the King's Writ to such Purpose, (as all Sheriffs anciently were and as Coroners still are,) by the Freeholders of a County in the County-Court; after which Election it was usual for the King to send another Writ to the Persons so chosen, commanding them diligently to attend their said Office till they should receive a Command from the King to the contrary. Lamb B. 1. Ch. 3.

Sect. 9. Conservators of the Peace by Prescription, were those who claimed such Power from an immemorial Usage in themselves, and their Predecessors or Ancestors, or those whose Estate they had in certain Lands, to exercise the like Power, which wholly depended upon such Usage both as to its Extent, and the Manner in which it was to be exercised. Bro. Peace 18. Prescription 79. 22 Ed. 4. 35. b. Lamb B. 1. Ch. 3.

[a] 21 Ed. 4. 67. a.

Sect. 10. It is [a] queſtioned indeed by ſome, Whether any ſuch Power can be claimed by Uſage? Yet if the Power of holding Pleas and even Courts of Record, which of are ſo high a Nature, and imply a Power of keeping the Peace within their own Precincts, may be claimed by Uſage, as it ſeems to be [b] certain, that they may; it ſeems ſtrange that the bare Authority of keeping the Peace in a certain Diſtrict may not as well be claimed by ſuch Uſage.

[b] Co. Lit. 114. b. Doctor and Student B. 1. Ch. 7.

[c] Dalt. B. 1. fol. 3. Crompt 6. b.

Sect. 11. It [c] ſeems, That the Power of ſuch Conſervators of the Peace, whether by Tenure, Election, or Preſcription was no greater than that of Conſtables at this Day, unleſs it were enlarged by ſome ſpecial Grant or Preſcription.

Lamb. B. 1. Ch. 3.

Sect. 12. The extraordinary Conſervators of the Peace were Perſons ſpecially commiſſioned, in Times of imminent Danger either from Rebels or foreign Invaders, to take care of and defend ſuch a particular Diſtrict committed to their Charge, and to preſerve the Peace within the Limits of it; and theſe had Power to command the Sheriff with his whole *Poſſe* to aid and aſſiſt them.

Sect. 13. And now I am in the ſecond Place to ſhew, in what Manner Juſtices of Peace have been ordained by the ſeveral Statutes concerning them, the firſt whereof is 1 *Ed.* 3. *Ch.* 16. which is in the following Words, *For the better keeping and Maintenance of the Peace, the King willeth that in every County, good Men and lawful, which be no Maintainers of Evil, or Barretors in the Country, ſhall be aſſigned to keep the Peace.*

Sect. 14 And it is farther enacted by 4 *Ed.* 3, 2. *That there ſhall be aſſigned good and lawful Men in every County to keep the Peace; and at the Time of the Aſſignments mention ſhall be made, that ſuch as ſhall be indicted or taken by the ſaid Keepers of the Peace, ſhall not be let to Mainpriſe by the Sheriffs, nor by none other Miniſters, if they be not mainpernable by the Law; nor that ſuch as ſhall be indicted, ſhall not be delivered but at the Common Law. And the Juſtices aſſigned to deliver the Gaols, ſhall have Power to deliver the ſame Gaols of thoſe that ſhall be indicted before the Keepers of the Peace; and that the ſaid Keepers ſhall ſend their Indictments before the Juſtices,* &c.

Sect. 15. And it is farther enacted by 18. *Ed.* 3. 2. *That two or three of the beſt Reputation in the Counties, ſhall be aſſigned Keepers of the Peace by the King's Commiſſion. And at what Time need ſhall be, the ſame with other wiſe and learned in the Law ſhall be aſſigned by the King's Commiſſion, to hear and determine Felonies, and Treſpaſſes done againſt the Peace in the ſame Counties, and to inflict Puniſhment reaſonably according to the Law and Reaſon, and the Manner of the Deed.*

Sect. 16. And it is farther enacted by 34 *Ed.* 3. 1. *That in every County of* England, *ſhall be aſſigned for the keeping of the Peace, one Lord, and with him three or four of the moſt worthy in the County, with ſome Learned in the Law, and they ſhall have Power to reſtrain the Offenders, Rioters, and all other Barretors, and to purſue, arreſt, take and chaſtiſe them according to their Treſpaſs or Offence; and to cauſe them to be impriſoned and duly puniſhed according to the Law and Cuſtoms of the Realm, and according to that which to them ſhall ſeem beſt to do by their Diſcretion and good Adviſement; and alſo to inform them, and to inquire of all thoſe that have been Pillors and Robbers in the Parts beyond the Sea, and be now come again, and go wandering, and will not labour as they were wont in Times paſt; and to take and arreſt all thoſe that they may find by Indictment, or by Suſpicion, and to put them in Priſon, and to take of all them that be not of good Fame, where they ſhall be found, ſufficient Surety and Mainpriſe of their Good Behaviour towards the King and his People, and the other duly to puniſh, to the Intent that the People be not by ſuch Rioters or Rebels troubled nor endamaged, nor*

nor the Peace blemished, nor Merchants nor other passing by the Highways of the Realm disturbed, nor put in the Peril which may happen of such Offenders; and also to hear and determine at the King's Suit, all Manner of Felonies and Trespasses done in the same County according to the Laws and Customs aforesaid.

Sect. 17. And it is enacted by 17 *R.* 2. 10. *That in every Commission of the Peace through the Realm, where need shall be, two Men of Law of the same County where such Commission shall be made, shall be assigned to go and proceed to the Deliverance of Thieves and Felons, as often as they shall think it expedient.*

Sect. 18. And it is farther enacted by 2 *H.* 5. Stat. 1. Ch. 4. *That the Justices of Peace in every Shire named of the* Quorum, *(except Lords, and the Justices of either Bench, and the Chief Baron, and Serjeants at Law, and the King's Attorney for the Time that they shall be occupied in the King's Service,) shall be resiant in the same Shire, and shall make their Sessions four Times by the Year,* viz. *in the first Week after* Michaelmas, Epiphany, Easter, *and the Translation of St.* Thomas *the Martyr, and oftner if Need be, and that the same Justices hold their Sessions throughout* England *in the same Weeks every Year.* 36 Ed. 3. 12. Lambert B. 4. Ch. 19. Crompt. 123.

Sect. 19. Also it is enacted by 2 *H.* 5. Stat. 2. Ch. 1. *That Justices of Peace shall be made in the Counties of* England, *of most sufficient Persons dwelling in the same Counties, by the Advice of the Chancellor and of the King's Counsel, without taking other Persons dwelling in foreign Counties to execute such Office, except the Lords and the Justices of Assises to be named by the King and his Counsel; and except all the King's Chief Stewards of the Lands and Seigniories of the Duchy of* Lancaster, *in the North Parts, and in the South, for the Time being.*

Sect. 20. Also it is enacted by 1 *Mar.* Sess. 2. Ch. 8. *That no Person having or using the Office of a Sheriff of any County, shall use or exercise the Office of a Justice of Peace, by Force of any Commission or otherwise, in any County where he shall be Sheriff, during the Time only that he shall exercise the said Office, or Sheriffwick: And that all Acts done by such Sheriff by Authority of any Commission of the Peace, during the Time aforesaid, shall be void.* Crompt. 121.

Sect. 21. Also there are many other Statutes concerning the Power of Justices of Peace, all of which it would be endless to enumerate; therefore I have only taken Notice of those which concern their Authority in general; and for those which concern the particular Branches of it, I shall refer the Reader to the Books which treat principally of this Subject.

Sect. 22. As to the third Point, *viz.* In what Manner Justices of the Peace are to be commissioned in Pursuance of the several Statutes concerning them; it is observable, That the Commission of the Peace hath often been altered in several Reigns, and that the present Form of it was settled by the Judges about the thirty-third Year of Queen *Elizabeth*, and is in Substance as followeth: 4 Inst. 171. Lamb. B. 1. Ch. 9.

Sect. 23. Beginning with a Salutation from the King to the several Persons named in it, it afterwards assigns them and every one of them, jointly and severally the King's Justices, to keep the Peace in such a County; and to cause to be kept all Statutes made for the Good of the Peace and quiet Government of the People, as well within Liberties as without; and to punish all those who shall offend against any of the said Statutes; and to cause all those to come before them, or some of them, who shall threaten any of the People as to their Persons, or the burning of their Houses, in order to compel them to find Surety for the Peace or Good Behaviour; and if they shall refuse to find such Surety, to cause them to be safely kept in Prison till they shall find it.

Sect. 24. Then it goes on and assigns them, and every two or more of them, (of which Number either such or such a particular Person among them is specially required to be,) Justices to inquire by the Oath of good and lawful

ful Men of the ſame County, of all Felonies, Witchcrafts, Inchantments, Sorceries, Magick Art, Treſpaſſes, Foreſtallers, Regraters, Ingroſſers, and Extortions whatſoever, and of all other Offences of which Juſtices of the Peace may lawfully inquire; alſo of all thoſe who ſhall go or ride armed, *&c.* or in Companies, to the Diſturbance of the Peace; and alſo of all Innholders and others who ſhall offend in the Abuſe of Weights or Meaſures, or ſelling of Victuals, *&c.* and alſo of all Sheriffs, Bailiffs, Stewards, Conſtables, Gaolers, and other Officers, who ſhall be faulty in the Execution of their Offices; and to inſpect all Indictments taken before them, or any of them, or other former Juſtices of the Peace for the ſame County; and to make and continue Proceſs againſt all the Perſons ſo indicted till they ſhall be taken, or render themſelves, or be outlawed; and to hear and determine all the Felonies, and other Offences aforeſaid: Provided that if a Caſe of Difficulty ſhall ariſe, they ſhall not proceed to give Judgment, except in the Preſence of ſome Juſtice of one of the Benches or of Aſſiſe.

Sect. 25. And then it commands them to make Inquiries of the Premiſſes, and to hear and determine the ſame at certain Days and Places, which they or any ſuch two or more of them ſhall appoint.

Sect. 26. And then it goes on and commands the Sheriff of the County to return before them at certain Days and Places to be made known to him by them, ſuch and ſo many lawful Men of his Bailiwick, by whom the Truth of the Premiſſes may be beſt known and inquired.

Sect. 27. And then concludes, by aſſigning ſome one of them Keeper of the Rolls of the Peace in the ſame County; and commanding him to cauſe to be brought before himſelf and his Fellows, at the ſaid Days and Places, the Writs, Precepts, Proceſſes, and Indictments aforeſaid.

And now I am in the fourth Place to ſhew, What is moſt obſervable from the ſaid Statutes and Commiſſions; in order to which I ſhall endeavour to ſhew,

1. What Statutes concerning the Peace may be executed by ſuch Juſtices.
2. How far the Juſtices of Peace for a County may act out of it, or within a Liberty.
3. What Commiſſions of this Kind require a ſpecial Suit to the King for the granting of them.
4. How far ſuch Juſtices have Power to proceed on Indictments not taken before themſelves.
5. By what Name they are to be deſcribed.
6. What Authority they have in Relation to Felonies.
7. What in relation to Treaſon, *Præmunire*, and Miſpriſion of Treaſon.
8. What in relation to inferior Offences.

Lamb. B. 1. Ch. 9. Dalt. Ch. 5. Crompt. 7, 8.

Sect. 28. As to the firſt Point, *viz.* What Statutes concerning the Peace may be executed by ſuch Juſtices, it ſeems certain, That by Vertue of the ſaid Commiſſion they may execute all Statutes whatſoever, made for the better keeping of the Peace, and conſequently thoſe of *Wincheſter* and *Weſtminſter*, and all others concerning the Peace made before the Reign of *Edward* the third, in whoſe Time Juſtices of Peace were firſt inſtituted; for all theſe Statutes were expreſly mentioned in the ancient Commiſſions of the Peace, and have always been undoubtedly taken to be included in the general Words of the preſent Commiſſion; and yet none of the Statutes which ordain the Office of Juſtices of Peace, ſay any Thing concerning

ing the Execution of the said former Statutes, so that the Power of Justices of Peace in relation to those Statutes, seems intirely to depend on the King's Commission, and yet hath always been unquestionably allowed; from whence it appears, That regularly the King by his Commission, may authorize whom he pleases to execute an Act of Parliament.

As to the second Point, *viz.* How far the Justices of Peace for a County may act out of it or within a Liberty? It is said, That they have no coercive Power when out of the County; and therefore that an Order of Bastardy, or for Payment of Labourers Wages made by them out of the County, is not binding; yet it is said, That Recognizances and Informations voluntarily taken before them in any Place, are good: And it is to be observed, Cro. Car. 211, 212.

Sect. 29. That the Justices of Peace for a County have by their Commission, an express Authority as well within Liberties as without; from whence it seems clearly to follow, That they may execute their Office within a Town, which has a special Commission of the Peace for its own Limits, unless such Commission have a Clause, that no other Justices, except those named in it, shall any way concern themselves in the keeping of the Peace within the Liberties of such Town; and it may be questioned, whether such a special Clause in such a Commission, do absolutely make void the Act of any County-Justice within such Town? since the Commission for the County seems as fully to give those named in it a Jurisdiction over all such Towns within the Precinct of it, as such Commission for a Town doth exclude them: And the Justices for the County seem to be under no Necessity of informing themselves of the Contents of a Commission, which they have nothing to do with; yet if they have express Notice given them of such a restraining Clause, and proceed to act within such Town in Defiance of it, they may perhaps be punishable for their Contempt of the King's Prohibition; and yet perhaps it may be questioned whether their Acts be void, for the Reasons abovementioned. Lamb. B. 1. Ch. 9. Lamb. B. 1. Ch. 9 Cont. Cromp. 8. 20 H. 7. 6, 7, 8.

Sect. 30. As to the third Point, *viz.* What Commissions of this Kind require a special Suit to the King for granting of them; it seems agreed, That notwithstanding all such Commissions must be in the King's Name, as hath been more fully shewn, *Ch.* 5. *Sect.* 1. yet there is not any need of a special Suit or Application to, or Warrant from the King, for the granting of them; for this is only requisite for such as are of a particular Nature, as constituting the Mayor of such a Town and his Successors, perpetual Justices of the Peace within their Liberties, *&c.* which Commissions are neither revocable by the King, nor determinable by his Death, as the common Commission for the Peace is, which is made of Course by the Lord Chancellor, according to his Discretion. Lamb. B. 1. Ch. 5. Brook Commission 5. Dalt. Ch. 3. 1 Lev. 219.

Sect. 31. As to the fourth Point, *viz.* How far Justices of Peace have Power to proceed on Indictments not taken before themselves, it is certain, That subsequent Justices of Peace may proceed upon Indictments taken before their Predecessors, but this seems chiefly to depend upon 11 *H.* 6. 6. which, *reciting the Inconvenience that Pleas and Processes upon Indictments before Justices of Peace had often been discontinued by making of new Commissions of the Peace, to the great Loss of the King,* &c. *ordains that such Pleas, Suits, and Processes before Justices of the Peace, shall not be discontinued by new Commissions of the Peace, but stand in Force: And that the new Justices, after that they have the Records of the same Pleas and Processes before them, may continue, and finally hear and determine the same,* &c. And this is farther confirmed by 1 *Ed.* 6. 7. Par. 6. But it is certain That they cannot proceed Cromp. 2. 9. Cromp. 9. H. P. C. 166, 167.

proceed on an Indictment taken before a Coroner, or Juſtices of *Oyer* and *Terminer*, or Gaol-Delivery, nor deliver Perſons ſuſpected by Proclamation: But by 1 *Ed.* 4. 2. they are enabled to proceed on Indictments taken before the Sheriff at his Torn.

2 Rol. Ab 95.

Sect. 32. As to the fifth Point, By what Name ſuch Juſtices are to be deſcribed, it is obſervable, That they are expreſly commiſſioned by the Name of Juſtices of Peace; and in no Part of their Commiſſion are called by the Name of Keepers of the Peace, yet, inaſmuch as by 18 *E.* 3. 2. which is one of the firſt Statutes made concerning their Inſtitution, they are expreſly called Keepers of the Peace, and the principal End of their Office is for the keeping of the Peace, and their uſual Deſcription in *Certiorari's* is by the Name of Keepers of the Peace; it hath been adjudged, That the Caption of an Indictment, (whereof Juſtices of Peace have Conuſance,) *coram* A. B. & C. D. *Cuſtodibus Pacis & Juſticiariis Domini Regis* in ſuch a Place, is good, without expreſly naming them Juſtices of Peace. Alſo it hath been reſolved, That the Deſcription of Juſtices of Peace by the Name of *Juſticiarii Domini Regis ad pacem conſervandam*, &c. is good without ſaying, *ad pacem Domini Regis*, for that it is neceſſarily implied.

The King and Howkins, Mich. 3 Geor.

Sect. 33. As to the ſixth Point, *viz.* What Authority Juſtices of Peace have in Relation to Felonies, it is obſervable, That ſuch of the ſaid Juſtices as are of the *Quorum* only, are expreſly authorized to inquire of, and hear and determine Felonies and Treſpaſſes, and that the abovementioned Statute of 18 *E.* 3. after it hath ordained, *That ſome Perſons ſhall be aſſigned Keepers of the Peace by the King's Commiſſion*, ſaith in another diſtinct Clauſe, *That at what Time need ſhall be, the ſame ſhall be aſſigned by the King's Commiſſions to hear and determine Felonies and Treſpaſſes*, &c. From whence it is inferred, That Juſtices of Peace have no Power to hear and determine Felonies, unleſs they be authorized ſo to do by the expreſs Words of their Commiſſion: And this Opinion is farther confirmed by the Authority of the Year-Books of [b] 2 *R.* 3. 9. *a. b.* and 12 *H.* 7. 25. *a.* wherein it is adjudged, That a *Certiorari* to remove certain Indictments taken before Juſtices of Peace was not good, becauſe it named them only Juſtices of Peace, without adding that they were alſo aſſigned to hear and determine Felonies, *&c.* Yet it ſeems, That it may probably be argued for the contrary Opinion, that the Statute of 34 *E.* 3. 1. is expreſs, that the Perſons aſſigned for the keeping of the Peace, ſhall have Power among other Things to hear and determine Felonies and Treſpaſſes, *&c.* And this ſeems to be the Principal Ground of the Reſolution in the Caſe of *Barnes* and *Conſtantine*, wherein it is adjudged, That the ſetting forth of an Indictment in a Declaration as taken before Juſtices of Peace, being alſo aſſigned to hear and determine Felonies, *&c.* was well juſtified upon *Oyer* of the Record, wherein it was entred as taken before Juſtices of Peace, without adding, That they were aſſigned to hear and determine Felonies, *&c.*. And as to the Authority of *Staundford* and *Hale*, it may be anſwered, That their Opinion is expreſly grounded on the wording of the Statute of 18 *E.* 3. And it does not appear that they conſidered the Purport of 34 *E.* 3. As to the Authority of 2 *R.* 3. 9. it may be anſwered, That the *Certiorari* therein mentioned, was for the Removal of an Indictment for counterfeiting Coin, and that the Power of Juſtices of Peace to take ſuch an Indictment, depends wholly upon the Statute of 3 *H.* 5. 7. whereby it is enacted, *That the Juſtices of Peace throughout the Realm, ſhall have Power by the King's Commiſſions to inquire of the ſaid Offence.* And as to what is ſaid in 12 *H.* 7. 25. it may be anſwered, that the *Certiorari* therein mentioned was to remove certain Indictments, but it doth not appear from the Book what thoſe Indictments were; ſo that it is poſſible

[a] Crompt. 120. b. S. P. C. 53. a. 58. *and* 96. *Letter* E. H. P. C. 165, 207.

[b] Brook Indictment 32, 50.

Cro. Jac. 32. Yelv. 46. 2 Roll. Rep. 151. Dy. 69. pl. 29.

sible they might be of a special Nature, not within the general Purview of 34 E. 3. *sed Quære.* However it is certain, That such a Clause in the Commission of Justices to hear and determine Felonies, *&c.* gives them no Jurisdiction over an Offence, which by Statute, is specially appointed to be determined by Justices of *Oyer* and *Terminer*, because such Justices shall be intended to mean such Justices of *Oyer* and *Terminer* only, which properly and usually are so called, and not those who are distinctly known by another Name. And from hence it follows, That Justices of Peace have no Power to take an Indictment upon the Statute of 5 *Eliz.* 14. concerning Forgery, nor on the 2 *&* 3 *Ed.* 6. 24. against Accessaries in one County to Felonies in another, nor on any other Statute which specially limits the Jurisdiction of determining any other Felony to other Justices of a particular Denomination. Yet inasmuch as all Felonies include in them a Breach of the Peace, and 2 *&* 3 *Ph. & Mar.* 10. which directs Justices of Peace to take the Examinations of all such Persons as shall be committed by them for Felony, seems to suppose them to have a general Power of committing all Persons accused of any Kind of Felony, and the general Practice has always been agreeable hereto; it is said, That Justices of Peace may take the Examination of Persons brought before them for any Kind of Felony, and commit them to Prison, and also take the Information of the Prosecutors upon Oath, and bind them over to prosecute, and to commit those who shall refuse to be so bound, if it appear that they can give material Evidence. Also inasmuch as the said Statute of 2 *&* 3 *Ph. & Mar.* 10. and also 1 *&* 2 *Ph. & Mar.* 13. direct Justices of Peace, in Case of Homicide and other Felonies, to take the Examination of the Offenders, and the Information of others, and to certify the same to the Justices of Gaol-Delivery; it hath been generally thought adviseable for Justices of Peace to proceed no farther in Relation to any Felonies, though within their Commission, except only Petit Larcenies.

H. P. C, 165. 9 Co. 118. b. Cro. El. 87, 601, 697. 2 Roll. Abr. 96. pl. 2.

Dalton Ch. 20. H. P. C. 167, 168.

H. P. C. 169.

Sect. 34. As to the seventh Point, *viz.* What Authority Justices of Peace have in relation to Treason, *Præmunire*, and Misprision of Treason; it seems to be agreed, That notwithstanding none of these Offences are within the Letter of their Commission, yet inasmuch as they are against the Peace of the King, and of the Realm, any Justice of Peace may, either upon his own Knowledge, or the Complaint of others, cause any Person to be apprehended for any such Offence. And it is the Opinion both of *Dalton* and Sir *Matthew Hale*, That such Justice may take the Examination of the Person so apprehended, and the Information of all those who can give material Evidence against him, and put the same in Writing, and also bind over such who are able to give any such Evidence to the King's Bench, or Gaol-Delivery, and certify his Proceedings to the same Court, to which he shall bind over such Informers. And this Opinion seems to be agreeable to constant Practice, especially since the Statutes of 1 *&* 2 *Ph. & Mar.* 13. and 2 *&* 3 *Ph. & Mar.* 10. which directing Justices of Peace to proceed in this Manner against Persons brought before them for Felony, seem to give them a discretionary Power of proceeding in like Manner against Persons accused of the abovementioned Offences.

Lamb. 226.

Dalt. Ch. 90. H. P. C. 168.

Sect. 35. Also by 3 *H.* 5. Ch. 7. *Justices of Peace shall have Power by the King's Commissions to inquire of Counterfeiting, Clipping, Washing, and other Falsity of Money of the Land, and thereupon to make Process by* Capias *only, against those who before them shall be thereof indicted.*

Sect. 36. And by 5 *El.* 1. Sect. 3. *Justices of Peace may inquire of the Offence of maintaining the Pope's Power, and shall certify every Presentment made*

made before them of any ſuch Offence, into the King's Bench, within forty Days after it ſhall be made, &c.

1 Leon. 239. *Sect.* 37. And by 23 *E.* 1. Sect. 8. *They may inquire of all Offences againſt that Act, or againſt the Acts of the firſt, fifth, or thirteenth Years of the ſaid Queen's Reign, touching acknowledging of the King's ſupream Government in Cauſes Eccleſiaſtical, or other Matters touching the Service of God, or coming to Church, or Eſtabliſhment of true Religion in this Realm, within one Year and a Day after every ſuch Offence committed.*

Sect. 38. As to the eighth Point, *viz.* What Authority Juſtices of Peace have in Relation to inferior Offences, it would be endleſs to enumerate all the Offences within their Juriſdiction, concerning which there have been ſuch great Numbers of Statutes; and therefore I ſhall content my ſelf in this Place with obſerving, that by the abovementioned Statute of 34 *Ed.* 3. 1. and alſo by the expreſs Words of their Commiſſion, they are impowered to hear and determine all Treſpaſſes, which is a Word of a very general Extent, and in a large Senſe not only comprehends all inferior Offences, which are properly and directly againſt the Peace, as Aſſaults and Batteries, and ſuch like, but alſo all others which are ſo only [a] 6 Mod. 128. by Conſtruction; as all Breaches of the Law in general are [a] ſaid to be: Yet it hath been of late ſettled, that Juſtices of Peace have no Juriſdiction over [b] Forgery or Perjury at the Common Law, the principal Reaſon of which Reſolution as I apprehended, was, that inaſmuch as the chief End of the Inſtitution of the Office of theſe Juſtices, was for the Preſervation of the Peace againſt perſonal Wrongs, and open Violence; and the Word Treſpaſs in its moſt proper and natural Senſe, is taken for ſuch kind of Injuries, it ſhall be underſtood in that Senſe only in the ſaid Statute and Commiſſion, or at the moſt to extend to ſuch other Offences only as have a direct and immediate Tendency to cauſe ſuch [c] 1 Lev. 139. 1 Sid. 271. 1 Keb. 559, 772, 788, 931. 2 Keb. 138. Contra Cro. Jac. 421. Tr. 13 Annæ. Breaches of the Peace, [c] as Libels, and ſuch like, which on this Account have been adjudged indictable before Juſtices of Peace: And for this Reaſon, principally as I apprehended, the Court of the King's Bench in the Caſe of one *Pitt*, ſince the abovementioned Reſolution concerning Perjury and Forgery, refuſed to quaſh an Indictment found at a Seſſion of the Peace for a Libel, but ordered the Defendant to demur to it, if he [d] Latch. 173. Poph. 208. thought fit. [d] And upon the like Reaſon perhaps the former Opinion, That one may be indicted before Juſtices of Peace for being a common Night-Walker and Haunter of Bawdy-Houſes, may not be thought to contradict the abovementioned Reſolution.

[b] Salk. 496. Crompt. 120. b. Lamb. B. 1. Ch. 12.

Cro. Jac. 32. Yelv. 46. Con. 2. Roll. Rep. 151. *Sect.* 39. And Juſtices of Peace by Vertue of the abovementioned Statute of 34 *Ed.* 3. 1. ſeem to have a Juriſdiction over Barretors, and ſuch like Offenders whether they be mentioned in their Commiſſion or not. And it ſeems clear, That Juſtices of Peace have Juriſdiction of all inferior Crimes within their Commiſſion, whether ſuch Crimes be mentioned in any Statute concerning them or not; for that all ſuch Crimes are either directly, or at leaſt by Conſequence, and Judgment of Law, againſt the Peace, and upon this Ground principally, as I apprehended, it was lately reſolved, That they may take an Indictment of Extortion.

King *and* Loggain.

Sect. 40. And now I am to conſider the Nature of the Court of theſe Juſtices Seſſions, by which we underſtand an Aſſembly of two or more of them, whereof one is of the *Quorum*, at a certain Day and Place before appointed, in order to inquire, hear and determine, in Purſuance of their Commiſſion, of any Cauſes or Matters therein contained. And for the better underſtanding hereof, I ſhall conſider the following Particulars:

1. By

1. By whom, and in what Manner ſuch Court is to be ſummoned and appointed.
2. What Perſons are bound to give their Attendance at it.
3. Whether it have any Power over its own Members.
4. The Difference between general, and ſpecial, and Quarter-Seſſions.

Sect. 41. As to the firſt Point, It ſeems clear from the expreſs Words of the Commiſſion, That any two ſuch Juſtices, whereof one is of the *Quorum*, may hold ſuch Court at ſuch Days and Places as ſhall be appointed by them, and that the Sheriff is bound to return proper Juries, and that the *Cuſtos Rotulorum* ought to bring the Rolls of the Peace before them, *&c.* Lamb. B. 4. Ch. 2. & 20.

Sect. 42. And from hence it ſeems to follow, That any two ſuch Juſtices may direct their Precept under their *Teſte* to the Sheriff, for the Summons of a Seſſion of the Peace, thereby commanding him to return a Grand Jury before them, or their Fellow Juſtices at a certain Day and Place, and to give Notice to all Stewards, Conſtables, and Bailiffs of Liberties to be preſent and do their Duties at ſuch Day and Place, and to proclaim in proper Places throughout his Bailiwick, that ſuch Seſſions will be holden at ſuch Day and Place, and to attend there himſelf to do his Duty, *&c.* Lamb. B. 4. Ch. 2.

Sect. 43. And it is ſaid, That ſuch a Precept by any two ſuch Juſtices, cannot be ſuperſeded by any of their Fellows, but only by Writ out of Chancery. Lamb. B. 4. Ch. 2. Crompt. 122. b.

Sect. 44. It is ſaid, That ſuch Juſtices may hold ſuch a Seſſion without any ſuch Summons, which ſeems to be a well grounded Opinion, as to their proceeding on Indictments before taken before themſelves or others, or on other particular Occaſions, for which there is no need either for the Attendance of Grand-Jurors, or Officers, *&c.* Lamb. B. 4. Ch. 2.

Sect. 45. As to the ſecond Point, *viz.* What Perſons are bound to give their Attendance at the Court of Seſſions, there is noDoubt but that the Sheriff, (who is bound both to return his Precept, and alſo to take the Charge of all the Priſoners who ſhall be committed to him) and alſo all Conſtables of Hundreds, who are to make their Preſentments required by ſeveral Statutes, (as that of Huy and Cry, and thoſe relating to Highways and Ale-houſes, *&c.* and alſo all Bailiffs of Franchiſes, and all Perſons returned on a Jury, and the *Keeper of the Houſe of Correction, *&c.* are bound to attend on every ſuch Summons as is abovementioned, on Pain of being amerced for their Default at the Diſcretion of the Court, *&c.* Lamb. B. 4. Ch. 3. *See the Statute of* Winchester, *and* B. 1. Ch. 78. S. 22. *and* Ch. 76. S. 45. * Vide 7 Jac. c. 4.

Sect. 46. As to the third Point, *viz.* Whether the Court of Seſſions have any Power over its own Members; it ſeems certain, That it hath no Authority to amerce any Juſtice of Peace for his Non-Attendance at any ſuch Court, as the Juſtices of Aſſiſe may for the Abſence of any ſuch Juſtice at the Gaol-Delivery; for it is a general Rule, That *inter pares non eſt poteſtas*, it being reaſonable rather to refer the Puniſhment of Perſons in a judicial Office, in relation to their Behaviour in ſuch Office, to other Judges of a ſuperior Station, than to thoſe of the ſame Rank with themſelves; and therefore it ſeems to have been holden, That if a Juſtice of Peace at the Seſſions who is not of the *Quorum*, ſhall uſe ſuch Expreſſions towards another who is of the *Quorum*, for which if he were a private Perſon, he might be committed or bound to his Good Behaviour; yet the Seſſions hath no Authority to commit him, or to bind him to his Good Behaviour: And yet it ſeems to be agreed, That if a Juſtice of Peace give juſt Cauſe Lamb. B. 4. Ch. 3. Crompt. 122. a. Fitz. Juſtices de Peace 3. Lamb. B. 4. Ch. 3. Crompt. 122. a.

to any Perſon to demand the Surety of the Peace againſt him, he may be
Ch. 60. Sect. 5. compelled by any other Juſtice to find ſuch Security, as hath been ſhewn in the firſt Book; for the Publick Peace requires an immediate Remedy in all ſuch Caſes.

Lamb. B. 4. Ch. 19. *Sect.* 47. As to the fourth Point, *viz.* The Difference between General and Special and Quarter-Seſſions, Mr. *Lambard* ſeems to make no Diſtinction between General and Quarter-Seſſions, but to take them as ſynonymous Terms? But it ſeems the better Opinion, That Quarter-Seſſions are a Species only of General Seſſions, and that ſuch Seſſions only are properly called General Quarter-Seſſions, which are holden in the four Quarters of the Year in Purſuance of the abovementioned Statute of 2 *H.* 5. 4. ſet forth more at large in the fifteenth Section of this Chapter; and that any other Seſſions holden at any other Time for the general Execution of the Authority of Juſtices of Peace, which by the abovementioned Statute, Juſtices of the Peace are authorized to hold oftener than at the Times therein ſpecified, if Need be, may be properly called General Seſſions; and that thoſe holden on a ſpecial Occaſion for the Execution of ſome particular Branch of their Authority, may properly be called Special Seſſions.

Lamb. B. 4. Ch. 20.

Salk. 474. pl. 11. 476. pl. 14. 480. pl. 29. 482. pl. 34.

CHAP. IX.

Of the Court of the Coroner.

Sect. 1. CORONERS are [a] ancient Officers by the Common Law; ſo [b] called, becauſe they deal principally with the Pleas of the Crown, and [c] were of old Time the principal Conſervators of the Peace within their County; and there ſtill ought to be a certain Number of them in every County; in [d] ſome more, in others leſs, according as the Uſage hath been.

[a] 2 Inſt. 31. S. P. C. 48, 49.
[b] 4 Inſt. 271. 2 Inſt. 31.
[c] Ch. 8. Sect. 3.
[d] F. N. B. 397. 4 Inſt. 271. 2 Inſt. 175.

Before I come to the particular Conſideration of their Duty and Authority, it may not be improper to premiſe the following Particulars:

1. What Perſons are qualified to be Coroners.
2. In what Manners they are to be placed in their Office.
3. How they may be diſcharged.

Sect. 2. As to the firſt Point, it is enacted by the Statute of *Weſtminſter* 1. Ch. 10. in the following Words, *Foraſmuch as mean Perſons and indiſcreet, now of late are commonly choſen to the Office of Coroners, where it is requiſite, that Perſons honeſt, loyal, and wiſe, ſhould occupy ſuch Offices: It is provided, That through all Shires ſufficient Men ſhall be choſen to be Coroners of the moſt loyal and moſt wiſe Knights, which know, will, and may beſt attend upon ſuch Offices, and which lawfully ſhall attach and preſent Pleas of the Crown.*

Sect. 3. It is obſervable, That this Statute ſeems expreſly to require that none under the Degree of Knighthood ſhall be choſen a Coroner, and that the Statute of *Merton*, Chapter the Third, which was made near forty Years before, ſeems to ſuppoſe, That all Coroners were Knights: And it is farther remarkable, That in the Writ *De Coronatore exonerando*, it is mentioned as a ſufficient Cauſe for the Diſcharge of a Coroner, that he is not

23 Aſſ. pl. 7. 4 Inſt. 271. Regiſter 177. b. F. N. B. 164.

not a Knight; yet inaſmuch as the principal Intent of putting thoſe Words into the Statute, was to prevent the chooſing of Perſons of mean Ability, which is ſufficiently anſwered, by chooſing Men of good Subſtance and Credit: And it has been generally found impracticable to find Knights enough in any County willing to undertake this Office, and the conſtant Uſage of many late Ages, which is the beſt Interpreter of Laws, hath ſuffered Perſons of good Ability, under the Degree of Knights, to be choſen and continue Coroners, without any Objection againſt them on this Account; it ſeems certain, That at this Day it is no good Cauſe to remove a Corouer, that he is not a Knight. For why ſhould not ſuch Uſage be as well allowed to make ſuch an Explanation of the Law concerning Coroners, as it unqueſtionably hath done of that relating to the Repreſentatives of a County in Parliament, who by the Writ for their Election are expreſly required to be *duo Milites gladio cincti*, and yet may certainly be well choſen in Purſuance of that Writ, though they be under the Degree of Knights?

S. P. C. 48. e. 2 Leon. 160, 161. F. N. B. 164. 2 Inſt. 176. Co. Lit. 169. b.

Sect. 4. It is farther enacted by 14 *E.* 3. 8. *That no Coroner be choſen, unleſs he have Land in Fee ſufficient in the ſame County, whereof he may anſwer to all manner of People.*

Sect. 5. As to the ſecond Point, *viz.* In what Manner Coroners are to be placed in their Office, it is obſervable, That they do not receive their Authority from the King's Commiſſion, but from the Election of the County, in Purſuance of the King's Writ, iſſuing out of, and afterwards returned into the Chancery: And this is the Reaſon why their Authority does not determine by the Demiſe of the King, as that of all Judges, acting by the King's Commiſſion only, regularly does, as hath been more fully ſhewn, *Chap.* 1. *Sect.* 11.

Sect. 6. The abovementioned Writ for the Election of a Coroner is in this Form: Firſt it recites the Death or Diſcharge of one or more former Coroners, and then commands the Sheriff to cauſe one other or more, as the Caſe is, to be choſen, in a full County-Court, by the Aſſent of the County, according to the Form of the Statute in that Caſe made and provided; who having taken his Oath in the uſual Manner, may do all Things which belong to the Office of a Coroner, *&c.* and then it concludes with commanding the Sheriff to certify to the Court the Name of the Perſon choſen, *&c.*

See the Form of ſuch Certificate in Raſtal's Entries 133.

Sect. 7. A Coroner, being choſen by Vertue of ſuch Writ, ſhall be ſworn by the Sheriff, that he will lawfully do what belongs to the Office of a Coroner, *&c.*

S. P. C. 49. d. F. N. B. 163. M. 4 Inſt. 271.

Sect. 8. And inaſmuch as he is choſen by the County, if he be inſufficient, and not able to anſwer ſuch Fines and other Duties in reſpect of his Office, as he ought, the County, as his Superior, ſhall anſwer for him.

2 Inſt. 174, 175.

Sect. 9. And it is enacted by 28 *E.* 3. 6. *That all Coroners of the Counties, ſhall be choſen in the full Counties by the Commons of the ſame Counties, of the moſt meet and lawful People, that ſhall be found in the ſame Counties, to execute the ſaid Office: Saved always to the King and other Lords, who ought to make ſuch Coroners, their Seigniories and Franchiſes.*

From this Statute the two following Points are obſervable.

Sect. 10. Firſt, that all ſuch Elections are appointed by it to be made by the Commons of the Counties, without mentioning Freeholders; and yet inaſmuch as the ſaid Statute was made in Affirmance of the Common Law, and [a] none but Freeholders are Suitors to the County-Court,

F. N. B. 164. S P. C. 49. B. [a] 2 Inſt. 99. 2 Rol. Abr. 121. F.

Court, and the Uſage hath always been, both before and ſince the ſaid Statute, for ſuch only to vote, it is certain that none but Freeholders have a Voice at any ſuch Election.

Sect. 11. Secondly, That it is clearly ſuppoſed by the ſaid Statute, that not only the King, but alſo other Lords have the Franchiſe of making Coroners: From whence it ſeems reaſonable to infer, That the King may lawfully claim ſuch Franchiſe by Preſcription, and that other Lords may claim it by Grant from the Crown; but it is a Privilege of ſo high a Nature, that no Subject can well intitle himſelf to it by Preſcription only.

Co. Lit. 114. a.

Sect. 12. As to the third Point, *viz.* In what Manner Coroners may be diſcharged from their Office; it is certain, That if any of them be ſo far engaged in any other publick Buſineſs in the County, that he cannot have Leiſure enough to attend the Office of a Coroner; or if he be choſen Verderor of a Foreſt, or if he have not ſufficient Lands in the ſame County, whereon to live according to his State and Degree, or if he be diſabled either by old Age, or any inveterate Diſeaſe, as the Palſy, or the like, to execute his Office, as he ought, and as ſome ſay, if he follow any common Trade, he may be diſcharged by the Writ *De Coronatore exonerando*, which being directed to the Sheriff, after a Recital of the particular Cauſe of the Diſcharge of ſuch Coroner, commands him to cauſe another to be choſen in his Room.

Regiſter 177. a. b. F. N. B. 163, 164. S. P. C. 48. *Letter* E. 8 Co. 41. b. 2 Inſt. 32.

Sect. 13. But if any Writ of this Kind be grounded on an untrue Suggeſtion, the Coroner may procure a Commiſſion from the Chancery to inquire of the Truth of it, and to return the Inquiry before the King into the Chancery; and if upon ſuch Commiſſion the Suggeſtion be diſproved, the King may make a *Superſedeas* to the Sheriff, that he do not remove ſuch Coroner; or if he have removed him, That he ſuffer him to execute the Office as he did before.

Regiſter 177. b 178. a. F. N. B. 164. d. S. P. C. 49.

And now I am particularly to conſider the Duty and Authority of a Coroner; for the better underſtanding whereof I ſhall examine the following Points:

1. In what Places he hath a Juriſdiction.
2. How far he is impowered, and in what Manner he ought to take an Inquiſition.
3. How far to receive and proceed on a Bill of Appeal.
4. How far to receive and proceed on the Appeal of an Approver.
5. How far to take the Abjuration of a Felon.
6. How far the Act of any one of them ſhall be as effectual as if it had been done by all.
7. In what Caſes he may lawfully take a Fee for the Execution of his Office.
8. In what Caſes a Matter recorded by, or found before him, admits of no Traverſe.

As to the firſt Point, *viz.* In what Places a Coroner hath Juriſdiction, I ſhall conſider:

1. How far he hath a Juriſdiction of Offences committed on the Sea.
2. How far a Coroner of the County may intermeddle with Offences done within the Verge of the Court, and *vice verſa*.

Sect. 14. As to the firſt Particular, it is laid down as a general Rule by [a] ſome, That he may inquire of a Felony committed on the Arms of the Sea, where a Man may ſee from the one Side to the other; but by others,

[a] Owen 122. Moor 892. pl. 1255. H. P. C. 171. S. P. C. 51. *Letter* K.

thers, who ſeem to be more accurate, his [a] Power is confined to ſuch Parts of the Sea, where a Man ſtanding on the one Side, may ſee what is done on the other: But it ſeems to be [b] agreed, That he hath no Juriſdiction of Offences committed in the open Sea, between the high and low Water-Mark when the Tide is in; but that he hath an Authority over Offences committed in ſuch Places when the Tide is out.

[a] Fitz. Coron. 399. 4 Inſt. 140. 2 Rol. Abr. 169. pl. 7. [b] 3 Inſt. 113. 5 Co. 107. [c] 2 Leon. 160. 4 Co. 46. b. [d] 2 Leon. 160. 4 Co. 46. b.

Sect. 15. As to the ſecond Particular, *viz.* How far a Coroner of the County may intermeddle with Offences done within the Verge of the Court, *& vice verſa*; it is ſaid, That at the Common Law, as the Coroner of the King's Houſe had nothing to do with an Offence committed in the County out of the Verge, ſo neither had the Coroner of the County any Thing to do with an Offence committed within the Verge. And therefore it ſeems, That before the Statute of *Articuli ſuper Chartas*, if a Perſon had been killed any where within the Verge of the Court, and the King had removed his Court before the Coroner of the King's Houſe had taken an Indictment, no Coroner at all had any Juriſdiction of the Fact; not the Coroner of the County, becauſe he had nothing to do with what happened within the Verge of the Court; not the Coroner of the King's-Houſe, becauſe his Authority ceaſed when the Place where the Matter happened, ceaſed to be within the Verge of the Court; and this ſeems to be confirmed by the Statute of *Articuli ſuper Chartas*, Ch. 3. whereby it is recited, that before the making of that Act, *Many Felonies committed within the Verge had been unpuniſhed, becauſe the Coroners of the County had not been authorized to inquire of Felonies done within the Verge, but the Coroner of the King's Houſe, which never continued in one Place, by Reaſon whereof there can be no Trial made in due Manner, nor the Felons put in Exigent, nor outlawed, nor any Thing preſented in the Circuit, the which had been to the great Damage of the King, and nothing to the Preſervation of the Peace:* And thereupon it is ordained, *That from thenceforth in Caſes of the Death of Men, whereof the Coroners Office is to make View and Inqueſt, it ſhall be commanded to the Coroner of the County, that he with the Coroner of the King's Houſe, ſhall do as belongeth to his Office, and enroll it,* &c. It is ſaid indeed by Sir *Edward Coke*, That if a Murder had been committed within the Verge, and the King had removed before any Indictment taken by the Coroner of the Verge, the Coroner of the County might have inquired of the ſame at the Common Law, *ne maleficia remanerent impunita:* But ſince no Authority is cited by him for the Maintenance of this Opinion, and the Argument brought to prove it is founded on a miſtaken Suppoſition, inaſmuch as it doth by no Means follow, That ſuch Offences would be diſpuniſhable if they could not be inquired of by the Coroner of the County, ſince they might certainly be indicted before Juſtices of *Oyer* and *Terminer*, or of the Peace, who have a general Juriſdiction throughout the whole County; the contrary Opinion ſeems rather the more plauſible, as being more agreeable to the Purport of the ſaid Statute, and the general Tenor of our Law Books.

2 Inſt. 550. 2 Inſt. 549. 4 Co. 46 b. 47. a. 4 Co. 47.

Sect. 16. But it is certain, That an Indictment taken before the Coroner of the County, and the Coroner of the King's Houſe, of an Offence not appearing by the Indictment it ſelf, to have happened within the Verge of the Court, is inſufficient; for that every material Part of an Indictment ought to be found by the Oaths of the Indictors, and cannot be ſupplied with any Averment; and it doth not appear by the Indictment, that the Coroner of the King's Houſe had any Authority to take it, and it ſhall not be ſaid to be void, and *coram non judice* as to the Coroner of the King's Houſe, and good as to the Coroner of the County, inaſmuch as the Record is entire, and the Indictment was taken entirely

4 Co. 47. 2 Inſt. 550.

before both; and peradventure the Jury was directed principally by the Coroner of the House, and the Witnesses examined and sworn by him.

Sect. 17. It hath been resolved, That if the same Person be Coroner of the County, and also of the King's House, an Indictment of Death taken before him as Coroner both of the King's House, and of the County, is good, because the Mischief expressed in the Statute, is remedied as well when both Offices are in the same Persons as when they are in divers.

4 Co. 46. a. 3 Inst. 134. 2 Leon. 160. *the same Case, but no Resolution.*

Sect. 18. Also it is enacted by 33 *H.* 8. 12. Par. 1. *&* 3. *That all Inquisitions upon the View of Persons slain within any of the King's Palaces or Houses, or any other House or Houses, at such Time as his Majesty shall happen to be there demurrant or abiding in his Royal Person, shall be taken by the Coroner for the Time being of the King's Household, without any adjoining or assisting of another Coroner of any Shire within this Realm, by the Oath of twelve or more of the Yeomen, Officers of the King's Household, returned by the two Clerks Controllers, the Clerks of the Check, and the Clerks Marshals, or one of them, for the Time being, of the said Household, to whom the said Coroner of the same Household shall direct his Precept, which Coroner shall be from Time to Time appointed by the Lord Great Master, or Lord Steward for the Time being; and that the said Coroner shall certify under his Seal, and the Seals of such Persons as shall be sworn before him, all such Inquisitions before the said Lord Master or Lord Steward,* &c.

As to the second general Point, *viz.* How far a Coroner is impowered, and in what Manner he ought to take an Inquisition, I shall consider his Authority of this Kind,

1. In Relation to Death.
2. In Relation to other Matters.

As to his Authority to take an Inquisition of Death, I shall examine,

1. In what Cases and in what Manner he ought to take such Inquisition.
2. What farther Care must be taken by him for the Prosecution of the Offender, after taking the Inquisition.
3. What high Credit the Law gives to it.

Sect. 19. As to the first of these Particulars, it is enacted by 4 *E.* 1. commonly called the Statute *de officio Coronatoris, That the Coroner upon Information, shall go to the Places where any be slain, or suddenly dead or wounded, and shall forthwith command four of the next Towns, or five or six, to appear before him in such a Place; and when they are come thither, the Coroner upon the Oath of them shall inquire in this Manner; that is to wit, if they know where the Person was slain, whether it were in any House, Field, Bed, Tavern, or Company, and who were there. Likewise it is to be inquired who were culpable, either of the Act, or of the Force, and who were present, either Men or Women, and of what Age soever they be, (if they can speak or have any Discretion.) And how many soever be found culpable by Inquisition in any of the Manners aforesaid, they shall be taken and delivered to the Sheriff, and shall be committed to the Gaol: And such as be founden, and be not culpable, shall be attached until the coming of the Justices, and their Names shall be written in the Coroners Rolls. If it fortune any such Man be slain, which is found in the Fields, or in the Woods, first it is to be inquired whether he were slain in the same Place or not. And if he were brought and laid there, they shall do as much as they can, to follow*

Bract. 121. Fleta B. 1. Ch. 25.

low their Steps that brought the Body thither, whether he were brought upon a Horſe, or in a Cart. It ſhall be inquired alſo, if the dead Perſon were known, or elſe a Stranger, and where he lay the Night before, and if any be found culpable of the Murder, the Coroner ſhall immediately go unto his Houſe, and ſhall inquire what Goods he hath, and what Corn he hath in his Grange; and if he be a Freeman, they ſhall inquire how much Land he hath, and what it is worth yearly, and further, what Corn he hath upon the Ground. And when they have thus inquired upon every Thing, they ſhall cauſe all the Land, Corn, and Goods to be valued, in like Manner as if they ſhould be ſold incontinently, and thereupon they ſhall be delivered to the whole Townſhip, which ſhall be anſwerable before the Juſtices for all. And likewiſe of his Freehold, how much it is worth yearly over and above the Service due to the Lords of the Fee, and the Land ſhall remain in the King's Hands, until the Lords of the Fee have made Fine for it. And immediately upon theſe Things being inquired, the Bodies of ſuch Perſons being dead or ſlain ſhall be buried. In like Manner it is to be inquired of them that be drowned, or ſuddenly dead, and after ſuch Bodies are to be ſeen, whether they were ſo drowned or ſlain, or ſtrangled by the Sign of a Cord tied ſtrait about their Necks, or about any of their Members, or upon any other Hurt found upon their Bodies, whereupon they ſhall proceed in the Form aboveſaid; and if they were not ſlain, then ought the Coroner to attach the Finders, and all other in Company.

Sect. 20. *Alſo all Wounds ought to be viewed, the Length, Breadth, and Deepneſs, and with what Weapons, and in what Part of the Body the Wound or Hurt is, and how many be culpable, and how many Wounds there be, and who gave the Wound; all which Things muſt be inrolled in the Roll of the Coroners. Alſo Horſes, Boats, Carts, &c. whereby any are ſlain, that properly are called Deodands, ſhall be valued and delivered unto the Towns as before is ſaid.*

Sect. 21. It is obſervable, That this Statute being wholly Directory and in Affirmance of the Common Law, doth neither reſtrain the Coroner from any Branch of his Power, nor excuſe him from the Execution of any Part of his Duty not mentioned in it, which was incident to his Office before; and from hence it follows, That though the Statute mention only his taking Inquiries of the Death of Perſons ſlain or drowned or ſuddenly dead, yet he may and ought to inquire of the Death of all Perſons whatſoever who die in Priſon, to the end that the Publick may be ſatisfied, whether ſuch Perſons came to their End by the common Courſe of Nature, or by ſome unlawful Violence, or unreaſonable Hardſhips put on them by thoſe under whoſe Power they were confined.

Fitz. Coron. 421. 3 Inſt. 52, 91. Bro. Coron. 168. S. P. C. 51.

Sect. 22. And the like Reaſon alſo ſeems to be the beſt Ground of the Reſolution which we find in ſome [a] Books, That there is no Neceſſity that it appear in a Coroner's Inqueſt, that it was taken by the Oaths of Perſons of the next adjacent Towns, but that it is ſufficient to ſay, That it was taken by the Oaths of lawful Perſon of the County, inaſmuch as ſuch Inquiſitions being good before the ſaid Statute, which is wholly Declaratory, muſt needs be ſo ſtill; but it [b] ſeems, That it ought to appear in every ſuch Inquiſition at what Place, and by what Jurors by Name it was taken, and that ſuch Jurors were ſworn, and that the Reaſon given in ſome Books that ſuch Inqueſts ſhall be intended to have been taken by the Men of the next Towns ſeems very harſh, if it be ſuppoſed neceſſary to be taken by ſuch Perſons; for that ſuch Intendment would be contrary to the general Rule of the Law which will not ſuffer any material Part of an Indictment to be taken by Intendment.

[a] 1 Sid. 204. 1 Keb. 723, 744., 745. Con. Latch. 166. Poph. 210. Co. Ent. 354.

[b] Cro. El. 31.

1 Sid. 204. 1 Keb. 745.

Sect. 23.

Sect. 23. Alſo it is farther remarkable, that the Statute doth not expreſly ſay, That the Coroner ſhall take his Inqueſt on the View of the dead Body, and that an Inqueſt otherwiſe taken by him, ſhall be void: And yet it is clearly agreed by all the [a] Books, That a Coroner has no Manner of Power to take an Inquiſition of Death without a View of the Body, and that any ſuch Inqueſt taken by him without ſuch View, is meerly void. And for this Reaſon it hath been [b] adjudged, That if a dead Body in a Priſon, or other Place, whereon an Inqueſt ought to be taken, be interred, or ſuffered to lie ſo long, that it putrify before the Coroner hath viewed it, the Gaoler or Townſhip ſhall be amerced. Alſo it hath been [c] reſolved, That a Coroner may lawfully within convenient Time, as the Space of fourteen Days after the Death, take up a dead Body out of the Grave in order to view it, not only for the taking of an Inqueſt where none hath been taken before; but alſo for the taking of a good one, where an inſufficient one hath been taken before. But if the Body cannot be [d] found, or have lain ſo long before the Coroner hath viewed it, that he can be no Way aſſiſted from the View in the taking of his Inqueſt; or if there be Danger of infecting People in digging of it up, the Inqueſt ought not to be taken by the Coroner, (unleſs he have a ſpecial Writ or Commiſſion for that Purpoſe) but by Juſtices of Peace, or other Juſtices authorized to inquire of, hear and determine Felonies, *&c.* who ſhall take the Inqueſt on the Teſtimony of Witneſſes; but none can take an Inqueſt on View in any Caſe, but the Coroner.

[a] Fitz. Coron. 107. S. P. C. 51. G. 2 Levin. 141. Latch. 166. Noy 87. 2 R. 3. 2. pl. 5. 21 Ed. 4. 70. b. H. P. C. 170. Poph. 209.

[b] Fitz. Coron. 329, 339, 421. H. P. C. 170. S. P. C. 51. 1 Keb. 278. pl. 74.

[c] 21 Ed. 4. 70. b. 2 R. 3. 2 pl. 5. S. P. C. 51. H. P. C 170. Bro. Coron. 167, 173.

[d] S. P. C 51. H. P. C. 170. 2 Lev. 141. Latch. 166. 1 Vent. 352. Poph. 209. Salk. 190, 377. Noy 87. 2 Rol. Abr. 96. pl. 3. 1 Rol. Rep. 217.

Sect. 24. If a [e] Coroner take an Inqueſt after a Body hath been ſo long buried, that it may reaſonably be preſumed, that the View of it could be of no Manner of Uſe for the Information of the Jurors, the Court into which the Inquiſition is returned will in Diſcretion refuſe to receive or file it, upon Affidavit of the whole Circumſtances of the Proceeding.

[e] *The King and* Cawſey, Hillary 3 Georg.

Sect. 25. [f] Yet it is not neceſſary, That the Inquiſition be taken in the very ſame Place where the Body was viewed; for it hath been reſolved, That an Inquiſition taken at *D.* on the View of a Body lying dead at *L.* may be good.

[f] Latch. 166. *See* Poph. 209.

Sect. 26. As the Coroner hath no Power from the ſaid Statute, nor from 3 *H.* 7. 1. to inquire of any Acceſſories to a Felony after the Fact; ſo neither hath he any ſuch Power by the [g] Common Law; for he has nothing to do with any but thoſe who ſome Way or other cauſed the Party's Death: And therefore it hath been reſolved, That an Indictment of *J. S.* before a Coroner for having received and comforted one who had been guilty of a Murder, is void.

[g] 4 H. 7. 18 b. Fitz. Forfeiture 10. S. P. C. 183. *Letter* D. Keilw. 67. Daliſ. 32. Moore 29. pl. 95.

Sect. 27. But it is certain, That a Coroner may inquire of the Acceſſories before the Fact, as well as of the Principals; and that he [h] alſo may inquire, whether any in ſuch Manner found to have been guilty, did fly for the Offence; for which Flight they forfeit all their Goods and Chattels.

[h] S. P. C. 183. *Letters* C. D. 2 Lev. 141, 152. Keilw. 68. b. H. P. C. 170. Bro. Coron. 151. 8 Ed. 4. 4. a. vide infra Section.

Sect. 28. Alſo it is [i] certain, That a Coroner may and ought to inquire of all the Circumſtances of the Party's Death, and alſo of all Things which occaſioned it; and [k] therefore it is ſaid, That if it be found by his Inqueſt, that the Perſon deceaſed was killed by a Fall from a Bridge into a River, and that the Bridge was out of Repair by the Default of the Inhabitants of ſuch a Town, and that thoſe Inhabitants are bound to repair it, the Townſhip ſhall be amerced.

[i] Keilw. 67.

[k] Aleyn 51.

Sect. 29.

Sect. 29. Alſo it is agreed, That if a Coroner be remiſs in coming to do his Office when he is ſent for, *&c.* he ſhall be amerced, by Virtue of the abovementioned Statute *De coronatoribus.* Alſo it is farther enacted by 3 *H.* 7. 1. *That if any Perſon be ſlain or murdered in the Day, and the Murderer eſcape untaken, the Townſhip where the ſaid Deed is ſo done, ſhall be amerced for the ſaid Eſcape, and that the Coroner have Authority to inquire thereof upon the View of the Body dead: And that if any Coroner be remiſs and make not Inquiſitions upon the View of the Body dead, he ſhall forfeit for every Default an hundred Shillings.* SP.C. 51. H. Salk. 377. Fitz. Coron. 292, H. P. C. 170.

Sect. 30. As to the ſecond Particular, *viz.* What farther Care muſt be taken by a Coroner for the Proſecution of the Offender, after taking an Inquiſition of Death againſt him, it is farther enacted by the ſaid Statute of 3 *H.* 7. 1. *That after the Felony found, the Coroners deliver their Inquiſitions afore the Juſtices of the next general Gaol-Delivery, in the Shire where the Inquiſition is taken, the ſame Juſtices to proceed againſt ſuch Murderers if they be in the Gaol, or elſe the ſame Juſtices to put the ſame Inquiſitions afore the King in his Bench. And if any Coroner do not in ſuch Manner certify his Inquiſition, he ſhall forfeit an hundred Shillings.*

Sect. 31. Alſo it is enacted by 1 *&* 2 *Ph. & Mar.* 13. *That every Coroner, upon any Inquiſition before him found, whereby any Perſon or Perſons ſhall be indicted for Murder or Manſlaughter, or as Acceſſary or Acceſſaries to the ſame, before the Murder or Manſlaughter committed, ſhall put in Writing the Effect of the Evidence given to the Jury before him, being material: And ſhall bind all ſuch by Recognizance or Obligation, as do declare any Thing material to prove the ſame, to appear at the next general Gaol-Delivery to be holden within the County, City, or Town-Corporate where the Trial thereof ſhall be, then and there to give Evidence againſt the Party ſo indicted at the Time of the Trial, and ſhall certify as well the ſame Evidence, as ſuch Bond or Bonds in Writing, as he ſhall take, together with the Inquiſition or Indictment before him taken and found, at or before the Time of his ſaid Trial thereof to be had or made: And in Caſe any Coroner ſhall offend in any Thing contrary to the true Intent and Meaning of this Act, the Juſtices of Gaol-Delivery of the Shire, City, Town, or Place where ſuch Offence ſhall happen to be committed, upon due Proof thereof, by Examination before them, ſhall for every ſuch Offence ſet ſuch Fine on every ſuch Coroner, as they ſhall think meet, and eſtreat the ſame, as other Fines and Amerciaments aſſeſſed before Juſtices of Gaol-Delivery ought to be.*

Sect. 32. And it is enacted by 1 *H* 8. 7. *That if any Coroner ſhall not endeavour himſelf to do his Office upon any Perſon dead by Miſadventure, he ſhall forfeit forty Shillings.*

Sect. 33. As to the third Particular, *viz.* What high Credit the Law gives to an Inquiſition of Death found before a Coroner, it ſeems [a] certain, That anciently the Judges would not receive a Verdict, acquitting a Perſon of the Death of a Man found againſt him by a Coroner's Inqueſt, unleſs the Jury ſo acquitting the Defendant, had found at the ſame Time what other Perſon did the Fact, or by what other Means the Party came to his Death; becauſe it appeared by the Coroner's View upon Record, that a Perſon was killed: But it is [b] agreed, That the Judges cannot compel a Jury to make ſuch farther Inquiry on an Acquittal of a Defendant from any other Indictment, becauſe it doth not in ſuch Manner appear of Record by any ſuch Inquiſition, that a Perſon is dead: And it ſeems hard to reconcile the ſaid Practice of compelling a Jury to find ſuch farther Matter with Reaſon in any Caſe, unleſs it appear in the Courſe of the Evidence by what other Means not mentioned in the Indictment, the Party loſt his Life; for it ſeems ſtrange, That a Jury ſhould

[a] 13 E. 4. 3. pl. 7. 37 Aſſ. pl. 13. 11 H. 4. 93. pl. 51. 14 H. 7. 2. pl. 7. Fitz. Coron. 213. Keilway 686. S. P. C. 181. *Letters* P. C. Finch of Law 415. Brook Appeal, 42, 122. Bro. Indictment 10, 35. Bro. Coron. 32, 39, 52, 117.

[b] *See the Books above cited.*

be in any Caſe compelled to find a Matter upon their Oaths, which they have no Evidence to ſupport; and therefore if it no Way appear to them, by what other Means the Death in queſtion was occaſioned, it ſeems difficult to maintain that it ſhall not be ſufficient for them to declare ſo to the Court.

Sect. 34. How high a Credit is given by the Law to a Coroner's Inquiſition of Self-Murder, or of the Flight of a Perſon indicted for the Death of another, will be more fully ſhewn in the three laſt Sections of this Chapter.

Sect. 35. As to the ſecond general Point, *viz.* What Authority a Coroner hath to take an Indictment of other Matters, it is expreſsly ſaid in ſome [a] Books, That a Coroner hath no Power *Ex officio* to inquire of any Felony, but only of the Death of a Man upon View. And both [b] *Staundford* and [c] *Hale* ſeem to ſpeak doubtfully of this Matter, upon the Authority of thoſe Books; and [d] Sir *Edward Coke* ſeems expreſsly to declare his Opinion, That a Coroner hath no Power to take an Indictment in any other Caſe: Yet ſince it is expreſsly declared by the abovementioned [e] Statute *De officio Coronatoris*, That a Coroner ought to inquire of the Breakers of Houſes; and it is ſaid by [f] *Britton*, That he may inquire of Rape, and of the Breach of a Priſon, and ſuch Power hath never been expreſsly taken from him, it ſeems hard to ſay, That he may not ſtill make ſuch Inquiries if he pleaſe; for as to the Authority of 27 *Aſſ* 55. *&* 35 *H.* 6.27. *b.* which are cited for the Maintenance of the contrary Opinion, it may be anſwered, That this Point is not reſolved in either of thoſe Books, but only ſpoken of incidentally; for the very Point reſolved in 27 of *Aſſiſes*, ſeems to be no more than this, That a Coroner hath no Power to take an Indictment of an Acceſſary after the Fact; and that which is ſaid in 35 *H.* 6. concerning this Matter, is only brought in by Way of Argument concerning a Point of a quite different Nature.

[a] 35 H.6.27.b. 27 Aſſ. pl. 55. a. Fitz. Coron. 206. Bro. Appeal 111.
[b] S. P. C. 51. I K.
[c] H.P C. 171.
[d] 4 Inſt. 271. 2 Inſt 147.
[e] *See the Statute at large.*
[f] Britton 3.

Bracton, B.3. Ch. 6.

Sect. 36. However there ſeems to be no Doubt but that the Coroner may and ought to inquire of Treaſure-trove, concerning which it is enacted by the ſaid Statute of 4 *E.* 1. *De officio Coronatoris, That a Coroner being certified by the King's Bailiffs, or other honeſt Men of the Country, ſhall go to the Places where Treaſure is ſaid to be found.* And it is farther enacted in the following Part of the ſame Statute in theſe Words, *A Coroner ought alſo to inquire of Treaſure that is found, who were the Finders, and likewiſe who is ſuſpected thereof: And that may be well perceived where one liveth riotouſly, haunting Taverns, and hath done ſo of long Time; hereupon he may be attached for this Suſpicion by four or ſix, or more Pledges, if he may be found.*

S.P. C. 51.K. Bracton 120. b.

Sect. 37. It is alſo ſaid, That a Coroner may inquire of Royal Fiſhes, as Sturgeons, Whales, *&c.*

Sect. 38. As to the third general Point, *viz.* How far a Coroner is impowered to receive and proceed on a Bill of Appeal, I ſhall endeavour to ſhew,

1. How far he is authorized to receive ſuch Appeal.
2. How far to proceed upon it.
3. In what Manner it may be removed by *Certiorari*.

[a] *See the Statute at large.*
[b] Bract. 122. a. b. 147. Fleta, lib. 1. cap. 25. Britton, fol. 5. S. P. C. 64. 22 Aſſ. 97, 98. Finch 321.

Sect. 39. As to the firſt of theſe Particulars, it appears clearly from the abovementioned [a] Statute of 4 *E.* 1. *De officio Coronatoris*, and alſo from our ancient [b] Law-Books, That a Coroner in the County-Court may receive an Appeal of any Felony or Maihem, upon the Plaintiff's finding

finding ſufficient Pledges to the Sheriff for the Proſecution of the Suit. And it is obſervable, That the ſaid Books generally mention the Coroner as the Perſon before whom ſuch Appeal is to be commenced, without joining any other with him; from whence it ſeems clearly to be intimated, That the Coroner is the [b] only Perſon who hath a Juriſdiction in this Matter; and that at Common Law he might [c] receive ſuch Appeal without the Concurrence of any other, as he certainly may the Appeal of an Approver, *&c.* But it being provided by the Statute of *Weſtminſter* 1. *cap.* 10. That the Sheriff ſhall have Counter-Rolls with the Coroners, it ſeems, That no Appeal ſince that Statute is well commenced before the Coroner, [d] unleſs the Sheriff be alſo preſent, in order to take a Counter-Roll of the Proceeding: But it ſeems, That the Sheriff by Vertue of this Statute, is no more a Judge of the Matter than he was before; and therefore where it is ſaid by the Statute of 3 *H.* 7. 1. That an Appeal of Felony may be commenced before the Sheriff and Coroners of the County where it was done, it ſeems reaſonable to intend the Meaning of the Statute to be, that it may be commenced before them in the ſame Manner as before, and not without expreſs [e] Words to make any Alteration of the Juriſdiction given them by the Common Law.

[a] Con. 17 Aſſ. pl. 5. Bro. Appeal. 56 H.P. C. 171. S P.C.52 D. 64. *Letter* B.

[b] 2 Inſt. 176. 4 H. 6. 16. a. Bro. Appeal. 44.

[c] H P.C. 172.

[d] 39 H. 6. 41. a. 4 H. 6. 16. a. Contra Bro. Appeal 44.

[e] *Quære* S. P. C. 64. b.

Sect. 40. But it is [f] certain, That a Coroner hath no Power to receive a Bill of Appeal of any Offence done out of the County whereof he is Coroner, becauſe the Offender cannot be tried by the County: But it is [f] agreed, That he may receive the Appeal of an Approver, or take the Abjuration of one, who acknowledges a Felony done by him in any County, becauſe that after ſuch Confeſſions there is no Need of any Trial.

[f] H P.C. 171, 172. S. P. C 52. D. 53. Fitz. Coron. 237.

[g] *See* Dalton's Sheriff, cap. 106.

Sect. 41. As to the ſecond Particular, *viz.* How far a Coroner may proceed upon ſuch Appeal, it ſeems [g] probable, That before the Statute of *Magna Charta*, *cap.* 17. Coroners might try Offenders as well as receive Accuſations againſt them; but it is [h] agreed, That they cannot proceed ſo far ſince that Statute, by which it is enacted, *That no Sheriff, Conſtable, Coroner, or other Bailiff of the King, ſhall hold Pleas of the Crown.* Alſo it is agreed, [i] That Proceſs may be awarded in the County-Court on ſuch Appeals till the Exigent; but [k] it ſeems queſtionable, whether ſuch Proceſs may properly be ſaid to be awarded by the Sheriff and Coroner jointly, ſince the Coroner being the only Judge, as I have endeavoured to prove, *Sect.* 38. it ſeems to be moſt proper that the Proceſs be awarded by him only: Neither doth it ſeem clear, That the abovementioned Statute of *Magna Charta*, doth reſtrain the Coroner from awarding an Exigent, and thereon outlawing an Appellee; for ſince, as it is agreed by all, an Offender might become attainted by an Abjuration of a Felony made before a Coroner, why not as well by an Outlawry pronounced by him? And accordingly we find it taken for granted in ſome of the [l] old Books of the beſt Authority ſince this Statute, that Appellees may be outlawed for not appearing on Proceſs before the Coroner.

[h] 22 Aſſ. 97, 98. Bract. 147. a. Fleta, lib. 1. cap 25. 2 Inſt. 30, 31, 32. Bro. Appeal. 56, 62. Coron. 82.

[i] S, P. C. 64. H. P. C. 171.

[k] Contra S. P. C. 64. H. P. C. 171.

[l] 27 Aſſ. 47. 22 Aſſ. 97. Fitz. Coron. 184. Con. Bro. Appeal. 82. *Quære* Bro. Appeal. 109. S. P. C. 64. H P C 171.

Sect. 42. As to the third Particular, *viz.* In what Manner an Appeal before the Coroner may be removed by *Certiorari*, there [m] is no Doubt but that it may be removed either into the King's Bench or Chancery, by *Certiorari* directed to the Coroners and Sheriff. But it hath been [n] reſolved, That it cannot be removed by ſuch Writ directed to the Sheriff only, becauſe the Coroner is the Judge, and the Sheriff hath only a Counter-Roll by Vertue of the above-mentioned Statute of *Weſtm.* 1. *cap.* 10.

[m] S. P. C. 64. *Letter* B. 70. *Letter* C. H. P. C. 171, 172. 2 Inſt. 176.

[n] 14 H. 4. 15 b. 16. a. Bro. Appeal. 44. 2 Inſt. 176. S P. C. 64. *Letter* B. 70. *Letter* C.

Sect.

Sect. 43 As to the fourth general Point, *viz.* How far a Coroner is authorized to receive and proceed on the Appeal of an Approver, there is no Doubt but that the Coroner alone may receive such Appeal, [a] whether the Offence were committed in the same or in any other County, and may also award Process to the Sheriff against the Appellee, being in the same County, till it come to the Exigent; and it [b] seems, That it may be probably argued, that he may award Process even to an Outlawry, as hath been more fully shewn in the forty-first Section of this Chapter: But it is certain, That he cannot award any Process against an Appellee in a foreign County, but must leave it to the [c] Justices of Gaol-Delivery, or others, before whom the Appeal is afterwards recorded, who shall award Process against such Appellees in such Manner, as shall be more fully set forth in the Chapter concerning *Approvers*.

Sect. 44. As to the fifth general Point, *viz.* How far a Coroner is authorized to take the Confession and Abjuration of a Felon, there seems to be no Doubt but that he may record the Confession of the Breach of Prison by any Felon, *&c.* and also the [d] Confession of any Felony by an Approver; but the Law relating to these Matters being in great Measure obsolete, it seems needless over nicely to inquire into it; also it is certain that he might take an Abjuration, but this not having been in Use since 21 *Jac.* 1. 28. *Sect.* 6. 7. by which it is enacted, *That no Sanctuary or Privilege of Sanctuary, shall be admitted or allowed in any Case*, I shall only touch upon it, and take Notice, That at the Common Law, if a Person accused of any Felony (except [e] Sacrilege,) [f] whether in the same or any other County, for which he was liable to Judgment of [g] Death, and not charged with [h] High Treason, nor (as [i] some say) with Petit Treason, had fled to any [k] Church or Church-yard, and within [l] forty Days confessed himself guilty before the Coroner, and declared all the particular [m] Circumstances of the Offence, and thereupon taken the Oath in that Case provided, (the [n] Substance whereof was that he abjured the Realm, and would depart as soon as possible, at the Port which should be assigned him, and never return without Leave from the King, *&c.*) he saved his Life, if he observed the Terms of the Oath, by going with all [o] convenient Speed the nearest Way to the Port assigned, *&c.* but he was [p] attainted of the Felony by such Abjuration without more, and consequenrly forfeited his Lands and Goods, *&c.*

Sect. 45. As to the sixth general Point, *viz.* How far the Act of any one Coroner is as effectual as if it were done by all, it seems clear, That [q] where-ever Coroners are authorized to act as Judges, as in the taking of an [r] Inquisition of Death, or receiving an Appeal of Felony, *&c.* the Act of any one of them, who first proceeds in the Matter, is of the same Force as if all had joined in it; but it is said, That after [s] such Proceeding by one of them, the Act of any other will be void: Also it seems certain, That where Coroners are impowered only to act [t] ministerially, as in the Execution of Process directed to them upon the Default or Incapacity of the Sheriff, all their Acts will be void wherein they do not all join.

Sect. 46. As to the seventh general Point, *viz.* In what Cases a Coroner may lawfully take a Fee for the Execution of his Office, it is enacted by the Statute of *Westm.* 1. *cap.* 10. which was made in Affirmance of the Common Law, 2 *Inst.* 176. [u] *That no Coroner demand or take any Thing of any Man to do his Office, upon Pain of great Forfeiture to the King.*

Sect. 47.

[a] H.P.C. 172. S.P.C. 53. a. *See Section* 40.
[b] S.P.C. 73. H.P.C. 172.
[c] S.P.C 53. 73. H.P.C. 172. Fitz. Co. 462. 29 Ed. 3. 42.
[d] Vid. Sect. 36 & 49.
[e] Fitz. Coron. 420. S.P.C. 117. *Letter* B. 3 Inst. 115.
[f] Sup. Sect. 40.
[g] Bro. Coron. 183. S.P.C. 123. *Letter* A. Finch of Law 388, 389.
[h] Bro. Coron. 181. S.P.C. 116. G. Finch of Law 388.
[i] S.P.C. 116. *Letter* G. 117. *Letter* A. Bro. Coron. 181. Finch 388.
[k] S.P.C. 116. *Letter* F. 3 Inst. 115. Finch of Law 388.
[l] S.P.C. 117, 118. 3 Inst. 117.
[m] S.P.C. 117. *Letter* E. Fitz. Co. 54. 3 H. 7. 12. pl. 6.
[n] S.P.C. 119, 120. Finch of Law 389.
[o] 7 H. 7. 7. pl. 11. Bro. Coron. 145. S.P.C. 121,
[p] Fitz. Coron. 425. S.P.C. 122. c, Finch of Law 389. 3 Inst. 217.
[q] S.P.C. 53. a. 14 H. 4. 34. b.
[r] Vid. supra Ch. 1. S. 10.
[s] Fitz. Co. 107 S.P.C. 52. A. H.P.C. 172.
[t] S.P.C. 53. 14 H. 4. 34, 35. a. 39 H. 6. 40. b. 41, 42.
[u] *See* Book 1. Ch. 68.

Sect. 47. But it is enacted by 3 *H.* 7. 1. *That a Coroner have for his Fee upon every Inquiſition taken upon the view of a Body ſlain* 13 s. 4 d. *of the Goods and Chattels of the Slayer and Murderer, if he have any Goods; and if he have no Goods, of ſuch Amerciaments as ſhall fortune any Townſhip to be amerced for the Eſcape of the Murderer,* &c.

Sect. 48. But the Coroners endeavouring to extend this Statute to Perſons ſlain by Miſadventure, it was enacted by 1 *H.* 8. 7. *That upon a Requeſt made to a Coroner to come and inquire upon the View of any Perſon ſlain, drowned, or otherwiſe dead by Miſadventure, the ſaid Coroner ſhall diligently do his Office, without taking any Thing therefore, upon Pain to every Coroner that will not endeavour himſelf to do his Office, (as afore is ſaid) or that taketh any Thing for doing of his Office upon every Perſon dead by Miſadventure, for every Time forty Shillings.*

As to the eighth general Point, *viz.* In what Caſes a Matter recorded by, or found before a Coroner, admits of no Traverſe, I ſhall conſider the ſame in Relation,

1. To Abjurations or Confeſſions made before him.
2. To Eſcapes.
3. To Flights.
4. To Self-Murders.

Sect. 49. As to the firſt Particular, it is ſaid, That his Record of an [a] Abjuration, or of the Confeſſion of [b] breaking a Priſon, or of the Confeſſion of a Felony by an [c] Approver, is of ſo great Authority, as not only to eſtop the Party from taking any Traverſe to his having made ſuch Confeſſion, but alſo from alledging that what was ſaid by him was extorted by Dureſs, or other unfair Means. Alſo it ſeems that if the Party plead, That he is not the ſame Perſon who abjured, *&c.* and the [d] Coroner record that he is the ſame Perſon, ſuch Record is concluſive, *&c.* But in theſe [e] Caſes it ſeems, That the Judge for the better Information of his Conſcience, may in his Diſcretion if he think fit, take an Inquiry from the People living next to the Place, of the whole Circumſtances of the Matter, *&c.*

Sect. 50. As to the ſecond Particular, *viz.* That relating to Eſcapes found before a Coroner, it is [f] ſaid, That if it be found by a Coroner's Inqueſt, that a Murder was committed in ſuch a Town, and that the Murderer eſcaped untaken, the Townſhip cannot traverſe ſuch Eſcape, becauſe it makes them only liable to an Amercement, *& de minimis non curat Lex.*

Sect. 51. As to the third Particular, *viz.* That relating to a Flight found before a Coroner, it ſeems, That if a Perſon indicted of a Murder by a Coroner's Inqueſt, be alſo found to have fled for it, and afterwards upon his Trial be [g] acquitted of the Murder, and alſo found not to have fled for it; yet he ſhall forfeit his Goods, becauſe ſuch a finding that he did not fly by a Jury, who as ſome ſay, had nothing to do with it, and ought not to have been charged with ſuch Inquiry, ſhall not controll the Coroner's Inqueſt, which is of ſuch Authority, that immediately upon the Flight, the Party's Goods ſhall be delivered to the Townſhip, which ſhall be anſwerable for them. Alſo it ſeems [h] generally to be taken for granted, That the Party has no Remedy whatſoever to traverſe ſuch Flight found againſt him by a Coroner's Inqueſt; for that ſuch Inqueſt is of very great Authority, [i] inaſmuch as all Perſons of the neighbouring

[a] H. P. C. 171. Fitz Co. 124. S. P. C. 52. *Letter* B.
[b] S. P. C. 32. *Letter* H. 52. *Letter* B.
25 E. 3. 42. pl. 35. Fitz. Coron. 134, 243, 435.
[c] Fitz. Coron. 118, 169. 13 Aſſiſes, pl. 29.
[d] Fitz. Coron. 124. S. P. C. 52. Letter B.
[e] Fitz. Coron. 118, 124, 169. 12 Aſſ. 29. Bro. Coron. 75.
[f] S. P. C. 34. *Letters* A. B. 35. *Letter* F. 183. *Letter* D. *See* Fitz. 352.
[g] 13 H. 4. 13. pl. 6. Fitz. Forfeiture 29, 32, 35. 5 Co. 109 b. Dyer 238. pl. 36. H. P. C. 271.
[h] Bro. Coron 151. 8 E. 4. 4 a. 2 Lev. 141. Bro. Traverſe per ſans ceo, 229. 3 Keb. 564, 566.
[i] 2 Inſt. 147, 148. 3 Keb. 366.

Towns, above the Age of twelve Years, are bound to attend at the taking of it; and yet I cannot find any direct Reſolution ſettling this Point; but on the contrary it is certain, That Sir *William Staundford* makes a Query of it, and the Reaſon abovementioned, which is brought to ſupport the great Credit of ſuch Inqueſts, holds as ſtrongly againſt the traverſing them as to the Point of the Offence, in which reſpect it is at this Day generally holden that they may be traverſed, as will be more fully ſhewn in the next Section. And ſurely the other Reaſon which is given for this Opinion, That the Party only forfeits his Chattels by ſuch finding, and therefore ſhall not traverſe it, becauſe the Law reckons Chattels among thoſe *minima de quibus non curat Lex*, is very harſh and unaccountable; and it is very hard to ſay, That a Man ſhall be liable to forfeit all his Goods, which may perhaps be all that he is worth, by an [a] Inqueſt taken in his Abſence, without either hearing him, or giving him an Opportunity of defending himſelf.

Sect. 52. As to the fourth Particular, *viz.* That relating to Self-Murder found before a Coroner, it is ſtrongly holden in ſome [b] Books, that no Inqueſt of this Kind admits of any Traverſe; but the contrary Opinion being alſo holden by [b] Books of as great Authority, and ſeeming alſo to be more agreeable to the general Tenor of the Law in other Caſes; it ſeems to be the better Opinion, That ſuch Inqueſt being moved into the King's Bench by *Certiorari*, may be there traverſed by the Executor or Adminiſtrator of the Perſon deceaſed, and perhaps alſo [c] by the King or the Lord of the Manor, *&c.*

Sect. 53. Alſo if it [d] appear, That a Coroner hath been guilty of any corrupt Practice in the taking of an Inquiſition, it ſeems that a *Melius inquirendum* ſhall be awarded for the taking a new one by ſpecial Commiſſioners, who ſhall not proceed on the View of the Body, but on the Teſtimony of Witneſſes; and the Coroner ſhall have nothing to do in the taking ſuch new Inqueſt, becauſe it appears from his former Misbehaviour, that he is not fit to be truſted; but [e] where his Inquiſition is quaſhed for a Defect in Point of Form only, he may and ought to take a new one, in like Manner as if he had not taken any before.

[a] 3 Inſt. 55. 2 Lev. 141. H. P. C. 29. 1 Vent. 181, 182.

[b] 8 Ed. 4. 4. a. Bro. Coron. 151. 2 Lev. 141, 152. 2 Keb. 859. 2 Jon. 198. 1 Vent. 278. 3 Keb. 564, 566, 604, 800.

[c] *See the Books above cited.*

[d] Cro. El. 371. 3 Keb. 800. 856. 1 Mod. 82. Salkeld 190. 2 Keb. 859. 1 Vent. 181, 182, 352. 3 Mod. 80, 100, 238. Con. 2 Jones 198.

[e] 2 Rol. Abr. 32. pl. 5. 21 Ed. 4. 70. b. Salkeld 190.

CHAP.

CHAP. X.

Of the Sheriff's Torn.

Sect. 1. THE Sheriff's Torn is the King's Court of Record, holden before the Sheriff for redreſſing of common Grievances within the County; for the better underſtanding of the Nature whereof I ſhall examine the following Points. Finch 241. F. N. B. 82.

1. The original Inſtitution of this Court.
2. At what Time and in what Place it muſt be holden.
3. What Perſons owe Suit to it.
4. What Authority the Sheriff (or his Steward) hath as Judge of it.
5. What Kind of Offences are inquirable in it.
6. Within what Place ſuch Offences muſt ariſe.
7. By what Jurors and in what Manner Indictments in it ought to be found.
8. In what Manner they are to be proceeded upon.
9. In what Manner they are to be traverſed and determined.

Sect. 2. As to the firſt Point it is obſervable, That by the [a] Common Law, every Sheriff ought to make his Torn or Circuit throughout every Hundred in his County twice in the Year, in order to hold a Court in every ſuch Hundred for the Reformation of common Grievances, and the Preſervation of the Peace and good Government of the Kingdom. For which Purpoſe all the [b] Inhabitants of ſuch Hundreds, being above the Age of twelve Years, and not ſpecially privileged, (in ſuch Manner as ſhall be more fully ſet forth under the third Point,) are bound to attend at ſuch Courts in order to make Inquiries of all ſuch Offences; and alſo to give Security to the Publick for their good Behaviour, by taking an Oath to be faithful to the King, and to obſerve his Laws, and alſo by incorporating themſelves into ſome Free-Pledge or Tithing, which formerly ſignified a certain Number of Families living together in the ſame Precinct, the Maſters whereof were every one of them mutually bound for each other, and puniſhable for the Default of any Member of any ſuch Family, in not appearing to anſwer for himſelf on any Accuſation made againſt him.

[a] Co. 9. Preface. Dalton's Sheriff 385. Magna Charta 35. 2 Inſt. 70, 71, 73, 122. Bro. Leet 42. Britton 71.

[b] *See the Books above cited.* Fleta B. 1. Ch. 27. Bract. 124. b. 2 Inſt. 121 Lambard of Conſtables 8. Keilw 141. a.

Sect. 3. And the better inforcing of this Order ſeems anciently to have been the principal End of holding this Court, the Style whereof even to this Day muſt be *Curia viſus franci plegii Domini Regis tenta apud* C. *coram vicecomite in turno ſuo tali die, &c.* But it hath been reſolved, That the Law doth not take Notice of any ſuch Court, under the Style of *Turn' Vicecom' tent. tali die*; for the Word *Torn* properly taken, doth not ſignify the Sheriff's Court, but his Perambulation.

2 Inſt. 71, 72. Dalt. Sheriff 385, 391. Fitz. Leet 11.

Sect. 4. As to the ſecond Point, *viz.* At what Time, and in what Place, this Court is to be holden, it is ſaid, That at the Common Law, it might be holden at any Place within the Hundred, and as often as the Sheriff thought fit: But this having been found to give the Sheriff too great a Power of oppreſſing the People, by holding his Court at ſuch Times

6 H. 7 2 b. Dalt. Sheriff 390. Contra Co. Lit. 115. Kitchin 44 b. Dalt. Sheriff 390.

Times and Places at which they could not conveniently attend, in order thereby for his own Advantage, to increaſe the Number of his Amerce-ments, it was enacted by the Statute of *Magna Charta* 35. *That no Sheriff or his Bailiff, ſhall make his Torn through a Hundred but twice in a Year, and at the Place accuſtomed,* viz. *once after* Eaſter, *and again after the Feaſt of St.* Michael; *and that the View of Frank pledge ſhall be at the Term of St.* Michael.

Sect. 5. And it is farther enacted by 31 *E.* 3. Ch. 15. *That every Sheriff ſhall make his Torn yearly, one Time within the Month after* Eaſter, *and another Time within the Month after St.* Michael; *and if they hold them in other Manner, that then they ſhall loſe their Torn for the Time.*

[a] Dy. 151. pl. 4. Keilw. 192. Dalt. Sheriff, 390, 391.

Sect. 6. And it ſeems [a] certain, That ſince theſe Statutes the Sheriff is indictable for holding this Court at another Time, than what is therein limited, or at an unuſual Place.

[b] 38 H. 6. 7. a. 6H 7. 2. b. 3. a. S. P. C. 84.

Sect. 7. Alſo it hath been [b] reſolved, That an Indictment found at a Sheriff's Torn, appearing to have been holden at another Time, is void.

See 2 Danv. Ab. 256. pl. 14. 2 Inſt. 71. 2 Saund. 290.

Sect. 8. But it is obſervable, That neither of theſe Statutes do expreſsly mention a Court-Leet, and therefore it is ſaid in ſome [c] Books, That they do not extend to it; neither do I find any Reſolution, that an ancient Court-Leet holden at any other Time, or at an unuſual Place, is void: But on the contrary it is [d] ſaid, That a Court-Leet may be holden at any Place within the Precinct which the Lord thinks fitting. And it ſeems to be [e] agreed, That a Preſcription to hold ſuch Court oftner than twice in the Year is good; which ſeems hardly reconcileable with the general Rule of Law, That no Preſcription can ſtand good againſt a Statute which has negative Words, if a Court-Leet be conſtrued to be within the Purview of the abovementioned Statutes. It is true indeed, That both Sir *Edward Coke* and *Kitchin* endeavour to ſolve this Difficulty, by offering a Diſtinction that the ſaid Rule extends not to Statutes made in Affirmance of the Common Law; but it is queſtionable how far this will amount to a good Anſwer, ſince it ſeems to be holden by [f] others of good Authority, that the ſaid Statutes were not made in Affirmance of the old Law, but are introductory of a new one; yet it is certainly ſafeſt to hold a Court-Leet at the Times accuſtomed, for it is [g] ſaid, That if it be holden at an unuſual Time it is void. And it [h] ſeems, That no Court-Leet granted ſince the Statute, can be holden at any other Time than what is limited by it, becauſe every ſuch Court is derived out of the Torn, to which the Statute certainly did extend.

[c] Bro. Leet 23. 2 Leon. 74. 1 Rol. Rep. 201.

[d] 8 H. 7. 4. b. Kitchin 44. b. Owen 35. Daliſ 61.

[e] Co. Lit. 115. a. Kitchin 8. 44. Cro. El. 125, 245. 1 Rol. Rep. 201.

[f] Dalt. Sheriff 390. 6 H. 7. 2. b.

[g] 38. H. 6. 7. a. Fitz. Leet 2. Bro Leet 32. 2 Saund. 291.

[h] Cro. El. 245. Con. 2 Inſt. 72. 2 Saund. 291.

Sect. 9. It hath been [i] holden, That in every Caption of an Indictment taken in a Sheriff's Torn, or Court-Leet, the Day whereon it was taken ought to be ſet forth, that it may appear not to have been on a Sunday.

[i] 2 Keb. 731. 1 Vent. 107. 2 Saund. 290.

Sect. 10. As to the third Point, *viz.* What [k] Perſons owe Suit to the Sheriff's Torn, it is certain, That regularly all Perſons above the Age of twelve Years, are by the Common Law bound to appear at this Court in their proper Perſons, and that no Perſons ſo bound to appear, are within the Benefit of the Statute of [l] *Merton*, Ch. 10. which allows Suit-Service to be performed by Attorney. And that not only Maſters of Families, but alſo all their Servants are bound to pay ſuch Suit, and that every [m] Maſter may be amerced for ſuffering a Servant to continue with him a Year and a Day, without being put into the Decennary, *&c.*

[k] *See* Sect. 2.

[l] 2 Inſt. 99.

[m] 41 E 3. 26. b. 45 E 3. 26. b.

Sect. 11. But [a] Tenants in Ancient Demesne are privileged by the Common Law from coming to this Court, unless they and their Ancestors have Time out of Mind used to come to it: Also [b] Parsons of Churches have the like Privilege by the Common Law; and all [c] Peers of the Realm, and Women have the same Privilege by the Statute of *Marlebridge*, *cap.* 10. (and perhaps by the Common Law,) unless their Presence be specially required for some particular Cause.

[a] F.N.B, 161. *Letter* C. Dalt. Sheriff 387.
[b] Inst 121. *Quere* Bro. Leet 38.
[b] F.N.B. 160. c. 2 Inst. 121. Regist. 175.
[c] 2 Inst. 120, 121. Register 175. F.N.B. 160, 161. Dalt. Sheriff 186. Bract. 124. b.

Sect. 12. Also it seems [d] clear, That by the Common Law, as well as the said Statute of *Marlebridge*, *cap.* 10. no Man can be obliged to do Suit to any such Court, within the Precincts whereof he doth not reside, in respect of any Lands which he may have within the Jurisdiction of it; for that no Suit of this Kind is due in Respect of the Tenure of any Lands, but only in Respect of the personal Residence of the Party. And [e] if a Man have a House which stands upon the Precincts of two Leets, it is said, That he shall do his Suit to the Court within the Jurisdiction of which his Bed-chamber lies: And if [f] one have a House and Family in two Leets, it seems that he ought to do his Suit to that, wherein for the most part he personally resides, but no Man can be of two Leets; and therefore one who lives within a [g] private Leet, cannot be obliged to do Suit to the Sheriff's Torn, or to any other grand Leet, unless such private Leet, for some Default of the Lord, be seized into the King's Hands, or [h] unless the Lord of the Leet neglect to hold his Court.

[d] Regist 175. F. N. B. 160, Dalt. Sheriff 387.
[e] 2 Inst. 122. Dalt. Sheriff 387.
[f] 2 Inst. 122. Dalt. Sheriff 387.
[g] 2 Inst. 122. *See* 19H. 6. 1. 33 H. 6. 9.
[h] Cro. Jac. 584. Finch 246. Dalt. Sheriff 388.

As to the fourth Point, *viz.* What Authority the Sheriff (or his [i] Steward,) hath as Judge of this Court, I shall consider the same in Relation,

1. To Indictments.
2. To Fines and Amercements in general.
3. To the Appointment of Constables.

See the next Chapter, Sect. 3.
[i] Dalt. She. 388.

Sect. 13. As to the first of these Points, it seems, That by the Common Law he might proceed to [k] hear and determine any Offence within his Jurisdiction, being indicted before him and requiring a Trial. But it is clear, that he is restrained from this Power by the Statute of *Magna Charta*, *cap.* 17. By which it is enacted, *That no Sheriff, Constable, or other Bailiff of the King, shall hold Pleas of the Caown*: And it seems, That this Statute also extends to the [l] Stewards of Courts Leet, who cannot deliver any Persons indicted before them of Felony, but must refer them to the Justices of Gaol-Delivery; neither can they try any Person indicted before them of any other Offence, and therefore there is no Remedy to avoid such Presentments before them as are traversable, but [m] by removing them into the King's Bench, *&c.* as will be more fully shewn under the ninth Point,

[k] Dalt. Sheriff 400.
[l] 2 Inst. 32. Dalt. Sheriff 400.
[m] 8 H. 4. 17. 2. Bro. Leet 11. 27. H. 8. 2. Kitch. 22, 23. H. P. C. 175. 1 Ed. 3. Ch. 17.

Sect. 14. But it is certain, That the abovementioned Statute of *Magna Charta* 17. doth neither restrain the Sheriff's Torn, nor the Court-Leet, from taking [n] Indictments or Presentments, or awarding Process thereon in the same Manner as before; but this Power of awarding such Process, having been abused by the Sheriffs in their Torns, was taken from all of them, (except those of *London*,) but not from any Court-Leet, by 1 *E.* 4. 2. which is more fully set forth under the eighth general Point of this Chapter.

[n] Kitchin 42. b. Finch 386. 1 Ed. 3. Ch. 17.
[o] Dalt. Sher. 400, 401.

As to the ſecond Point, *viz.* The Sheriff's Authority in his Torn in relation to Fines, and Amercements, I ſhall conſider,

1. In what Caſes he may, and in what Manner he ought to impoſe a Fine.
2. In what Caſes he ought to award an Amercement.
3. In what Manner ſuch Amercement is to be awarded and affeered.
4. In what Manner ſuch Fine or Amercement is to be recovered.
5. What farther Penalty may be added to ſuch Fine or Amercement.

Sect. 15. As to the firſt Particular, it ſeems clear, That the Sheriff's Power in this Court is ſtill the ſame as anciently it was, in all Caſes not within either of the abovementioned Statutes of *Magna Charta* or 1 *E.* 4. from whence it follows, That he ſtill continues a Judge of Record, and may impoſe a Fine on all ſuch as ſhall be guilty of [a] any Contempt in the Face of the Court; alſo there ſeems to be no Doubt, but that he may impoſe what reaſonable Fine he ſhall think fitting, upon a [b] Suitor refuſing to be ſworn, or upon a [c] Bailiff refuſing to make a Panel, *&c.* or upon a [d] Tithingman neglecting to make his Preſentment, or upon one of the Jury [e] refuſing to preſent the Articles wherewith they are charged, or upon a Perſon duly choſen [f] Conſtable, refuſing to be ſworn.

Sect. 16. But it hath been [g] reſolved, That all ſuch Fines ought to be ſeverally impoſed on each particular Offender, and not jointly upon all of them, except where a whole Vill is to be fined; in which Caſe, for the Neceſſity of the Thing, a joint Fine upon all is good.

Sect. 17. As to the ſecond Particular, *viz.* In what Caſes the Sheriff in his Torn ought to award an Amercement, it ſeems that he hath a diſcretionary Power [h] either to award a Fine or Amercement for Contempts to the Court, as for a Suitor's refuſing to be ſworn, *&c.* Alſo there ſeems to be no Doubt, but that at the Common Law he might, as the Steward of a Court-Leet ſtill may, award an [i] Amercement of any Perſon indicted for an Offence not Capital within his Juriſdiction, without any farther Proceeding or Trial; And it ſeems to be taken for granted in [k] ſome Books, That he might in ſuch Caſes impoſe a Fine on the Offender if he thought fit; and the Statute of 1 *Ed.* 4. 2. which reſtrains him from levying any Fines or Amercements on Indictments found before him, clearly ſuppoſes him to have had a Power of impoſing ſuch Fines; from all which it ſeems probable, that in ſuch Caſes he had, and that the Steward of a Court-Leet ſtill hath a Power, either to amerce or fine the Offender, eſpecially if the [l] Crime were any Way enormous, as an Affray accompanied with wounding, *&c.*

Sect. 18. As to the third Particular, *viz.* In what Manner ſuch Amercement is to be awarded and affeered, it ſeems, That if by an Amercement be meant the Judgment, that the Party ſhall be *in miſericordia Domini Regis*, this being a [m] judicial Act, ought to be the Act of the Court only, and requires not the Concurrence or Aſſent of the Jury or any other, as appears from the conſtant Form of all Entries: Neither do I ſee any Reaſon why ſuch an Award of a *Miſericordia* by a Judge of a Court-Leet, ſhould expreſs any certain Sum for which the Party ſhould be *in Miſericordia*, except in ſuch Caſes only where no other Perſon is afterwards to affeer it; for in other Caſes the Award of a *Miſericordia* is only in order to authorize others to fix the Sum, which the Party

[a] *See* Book 1. Ch. 21. Sect. 11. *and the firſt* Chapter *of this Book*, Sect. 15.
[b] Fitz. Leet 11. Dalt. Sheriff 400. 2 Inſt. 142, 143. 44 E. 3. 19. b.
[c] 7 H. 6. 12.
[d] 10 H. 6. 7. b. 8 Co. 38. b.
[e] *See* 8 Co. 38. b. 39. a. Dalt. Sheriff 401. Dy. 211. b.
[f] 8 Co. 38. Dalt. Sheriff 400.
[g] 1 Rol. Rep. 33, 73. 11 Co. 42. b. 43. b. Dyer 211. b.
[h] Dalt. Sheriffs 400. Fitz. Leet 11. *See* 8 Co. 39, 40. Kitchin 43. b.
[i] Bro. Leet Keilw. 66. Finch 468. Kitchin 51, 52.
[k] Fitz. Torn 4. 8 E. 4. 5. pl. 15. Dalt. Sheriff 401.
[l] 8 Ed. 4. 5. pl. 15.
[m] 1 Jones 301. Cro. Car. 275. 8 Co. 38. b. 40. b.

Party is to pay to the King for his Default; and in such [a] Cases the Courts of *Westminster-hall*, never do more than award that the Party be *in Misericordia*, without mentioning any Sum in certain; and there seems no Reason, why the Judge of a Court-Leet should not follow the same Rule; and accordingly I find the Opinion of the Lord Chief Justice [b] *Hobart*, which is the chief Ground of a Resolution in [c] *Levinz*'s third Report, That every such Award of an Amercement must express a certain Sum, *over-ruled of late by the Court of King's Bench.

Sect. 19. But if by an Amercement be meant, the taxing or reducing to a Certainty, the Sum to be paid by the Party to the King, upon the Award of his being *in Misericordia*; it [d] seems, That if it be for an Offence indicted, it ought to be done by certain Officers called Affeerors, being specially chosen and sworn for this Purpose. It is true [e] indeed, That the common Entry of an Amercement upon a Presentment in a Court-Leet is, that the Party is amerced, or *in Misericordia* to such a Sum, without distinguishing between the Award of the *Misericordia*, and the Assessment of the Amercement, or shewing by whom they are made; yet in Judgment of Law the Award of the *Misericordia* is the Act of the Court only, and the Assessment of the Sum to be paid the Act of the Affeerers, and so it ought to be pleaded. But if the [f] Amercement be for a Contempt to the Court, it may be settled by the Judge himself, and needs no other Affeerment; for [g] the Judge of every Court of Record is the most proper Judge of all Contempts offered to such Court; and an Amercement of this Kind is in [h] Nature of a Fine, and called so in some [i] Books; and it seems to be a general [k] Rule, That no Fine for a Contempt is within the Statutes which require that Amercements be affeered.

Sect. 20. As to the fourth Particular, *viz.* In what Manner such [l] Fines and Amercements are to be recovered; it seems, That the King or Lord have an Election of common Right, either to distrain for them or to bring an Action of Debt; for the better understanding of the Nature of which Remedies, I shall first lay down some Rules concerning both of them in common, and then descend to each of them in particular.

As to what concerns the said Remedies in common, I shall lay down the following Rules:

Sect. 21. First, That it is safest in every Avowry, or Declaration of this Kind, expressly to [m] shew that the Offence was committed within the Jurisdiction of the Court: for if it were not, all the Proceedings were *coram non Judice*; and a Court shall not be presumed to have a Jurisdiction, where it doth not appear to have one. But perhaps it is not necessary to alledge in the Presentment it self, That [n] the Offence arose within the Jurisdiction of the Court; yet it is certainly adviseable to have such an Allegation, and that [o] perhaps may supply the want of the Averment of Juridiction in the Pleadings.

Sect. 22. Secondly, That it is [p] adviseable expressly to alledge, that the Offence was committed as well as that it was presented, *&c.* yet I cannot find any express Opinion to this Purpose; but on the contrary it is observable, That the [r] Precedents of Pleadings of this Kind in the best Authors, do not expressly aver that the Offence was committed, but only that it was presented, and that it arose in such a Place within the Jurisdiction of the Court, *&c.* It is true indeed, that it hath been generally [s] holden, That in an Avowry or Declaration for an Amercement in

[a] 8 Co. 40. b. *See* Rastal's Entries 553. a b 606. F. N. B. 76. *Letter* A.
[b] Hobart 129. 1 Rol. Abr. 542. pl. 5.
[c] 3 Lev. 206. 3 Mod 138.
* Salk. 56.
[d] 8 Co. 40. b. 3 Lev. 206. *See* Rastal's Entries 606. a. b. Kitchin 46. *See* Keilw. 66. a. 3 Keb. 362.
[e] Kitchin 51, 52, 53.
[f] Rastal's Entries 151. b. 7 H. 6. 12 b. 10 H. 6. 7.
[g] 8 Co. 40, 41. 2 Leon. 242. 3 Mod. 138.
[h] Brook Amercement 50.
[i] Savil 93. Co. Entries 572.
8 Co. 38. b. Rast. Ent. 553.
8 Co. 38, &c. 2 Inst. 196.
[k] Magna Charta 14 W. 1. 18.
[l] Rastal's Ent. 151, 553, 606. 2 H. 4. 24. b. 10 H. 6. 7. Cro. E. 581. Raym. 68. Savil 93, 94.
[m] Hob. 129. *See* Rastal's Ent. 553. a b. Co Ent. 572, 573.
[n] Hob. 129.
[o] *See* Rastal's Ent. 606.
[p] 2 Rol. Rep. 40. Raym. 337. Salk. 107, 108.
[r] Rastal's Entries 151, 553, 606. Co. Ent. 573.
[s] Moor 75. Cro. Jac. 582. Cro. El. 748, 885, 886. 3 Leon. 7, 8. 1 Leon 242.

in a Court-Baron, it is as neceſſary to alledge that the Offence was committed, as that it was preſented: But to this it may be anſwered, That a Court-Baron is not a Court of Record, and conſequently not of ſo high Authority as the Sheriff's Torn or a Court-Leet; neither are Preſentments in a Court-Baron, nor even in any other Court whatſoever, ſo highly credited by the Law as thoſe made in a Torn or Leet, which admit of no Traverſe to the Truth of them, except in ſome ſpecial Caſes, as will be more fully ſhewn under the ninth general Point of this Chapter.

Sect. 23. Thirdly, That it is ſafeſt in [a] ſetting forth a Preſentment, or an Affeerment of an Amercement, to ſhew the Names of the Preſentors and Affeerors; yet I cannot find this done in any of [b] *Raſtal*'s Precedents; and ſome have ſaid, That it is neceſſary to ſet forth the Names of the Preſentors in an Action of Debt, but not in Replevin.

Sect. 24. Fourthly, That it is adviſeable to ſhew, that proper [c] Notice was given of the holding of this Court, yet this I find omitted in ſome [d] Precedents; and perhaps the contrary Opinion may be the better, for that every Court of Record ſhall be preſumed to obſerve all neceſſary previous Incidents for the holding of it, and all Perſons within its Juriſdiction ſhall be intended to have Notice of it. And for the like Reaſon perhaps, it is not neceſſary in an Avowry for a [e] Diſtreſs for ſuch Fine or Amercement, to ſhew that the Party had previous Notice what it was.

As to the Recovery of ſuch Fines and Amercements by Way of Diſtreſs, I ſhall obſerve,

Sect. 25. Firſt, That it ſeems to be [f] ſettled at this Day, That a Diſtreſs is incident of common Right to every Fine and Amercement in a Sheriff's Torn or Court-Leet, whether the ſame belong to the King or to a Subject, if the Offence for which they were impoſed be of common Right incident to the Juriſdiction of ſuch Courts; but [g] if ſuch Offence were only the Neglect of a Duty created by Cuſtom, it is queſtionable whether it do not require the like Cuſtom for a Diſtreſs, though the Duty be of a publick Nature; but if it be for the [h] private Benefit of a Subject, it ſeems clear that no Diſtreſs is incident to it without a ſpecial Cuſtom.

Sect. 26. Secondly, That the Sheriff, or Lord of a Leet, may for ſuch Fines or Amercements diſtrain the Goods of the Offender in [i] any Lands within the County or Precinct of the Leet, of whomſoever they ſhall be holden, except [k] only in ſuch Lands which ſhall be in the King's Hands; for that all ſuch Lands, while they continue in the King's Poſſeſſion, are wholly out of the Juriſdiction of ſuch Courts.

Sect. 27. Thirdly, That ſuch a Diſtreſs may lawfully be taken in the [l] Highway; for that the Statute of *Marlebridge*, *cap.* 15. which prohibits the taking of a Diſtreſs there, is to be intended only of Diſtreſſes taken for Services due by Way of Tenure of Lands.

Sect. 28. Fourthly, That ſuch Fines and Amercements being for a perſonal Offence, no [m] Stranger's Beaſts can lawfully be diſtrained for them, though they have been levant and couchant on the Lands of the Offender.

Sect. 29. Fifthly, That it ſeems to be [n] agreed, That where any ſuch Court is in the King's Hands, the Goods diſtrained for ſuch Fines and Amercements may lawfully be ſold, after they have been kept a reaſonable Time, as the Space of ſixteen [o] Days; and it ſeems the better [p] Opinion,

[a] Keilw. 66. a. 3 Keb. 362. Co. En. 572. 773.
[b] Raſtal 553, 606.
9 E 4. 40. b.
[c] 10 H. 7. 15. pl. 12.
1 Vent. 105. Raym 204. Coke's Ent. 572, 573. Raſt Entries 553, 606
1 Rol. Abr. 365, pl a. 468. pl. b.
2 Rol. Abr. 136.
1 Rol. Rep. 201.
[d] Co. Ent. 572, 573. Raſtal's Ent. 553, 606.
45E. 3. 9 a.b. Raſt. Ent. 553 606.
[e] 1 Rol. Abr. 665. f. 666. pl 2, 3.
1 Ro. Re. 201. 11. Co. 45. a. 8 Co. 41. Cro. Jac. 382.
10 H. 7. 15. pl. 12.
10 H. 6. 7. Con. 11 H 7. 14 a.
21 H 7 40 b.
[g] 1 Vent 105. Raym. 204. 2 Keb. 701. 739. 745
[h] 1 Ro. R. 76. 11 Co. 44. b.
[i] 2 H 4. 24. b. 47 E 3. 13. a. Bro. Leet 28, 41. Fitz. Avowry 194. 1 Rol. Abr. 670. L 1, 2, 3, 4. 2 Inſt. 104.
[k] 47 Ed. 3. 12, 13 Fitz. Diſt. 15. 1 Rol. Abr. 670. pl 5
[l] 2 Inſt. 131. 47 E. 3. 13. a. 1 And. 72.
[m] 47 E. 3 13. a. 41 E. 3. 26. b. Bro. Diſtr. 3. F. N. B. 100. H Owen 146. Noy 20. Con. 1 Rol. A. 669. pl. 20.
[n] Hetley 62. Finch 476.
[o] Hetley 62.

[a] Opinion, That where any such Court is in the Hands of a common Person, if the Goods were distrained for an Offence of a publick Nature, they may be sold of common Right, without any special Custom for that Purpose.

Sect. 30. Sixthly, That no Bailiff can lawfully distrain for any such Fine or Amercement, without a special [b] Warrant for so doing, which must be set forth by him in an Avowry or Justification of such a Distress.

Sect. 31. As to the Recovery of such Fines and Amercements by Action of Debt, being scarce able to find any Thing remarkable concerning this Matter, except what hath been already taken Notice of, I shall content my self with this one Observation, That the Defendant shall [c] not be suffered to wage his Law in any such Action, because it is grounded on the Act of a Court of Record.

Sect. 32. As to the fifth Particular, *viz.* What farther Penalty may be added to such Fines and Amercements, there seems to be no Doubt, but that upon a Presentment of a common Nusance in a Torn or Leet, the Sheriff or Steward may either amerce the Person presented, and [d] also order him to remove the Nusance by such a Day, under Pain of forfeiting a certain Sum, or may order him to remove it under such a Pain [e] without amercing him at all. But it seems doubtful, Whether such Person be bound at his Peril, to take Notice of and obey such Order, being made in his [f] Absence, unless express Notice be given him of it; but if he have such Notice it seems clear, That he shall forfeit the Pain upon a Presentment at another Court, that he hath not removed such Nusance, [g] without any farther Proceeding: Also it seems, That no such Pain can be affeered to any [h] lesser Sum than what is at first set; and it is said, That every such Pain when forfeited, may be recovered [i] either by Distress or Action of Debt, in the same Manner as a Fine or Amercement may be: And this Point seeming to be agreed by most of the Books cited in the Margent, it seems probable, That the Reason of the Judgment is mistaken in *Fletcher* and *Ingram*'s Case, as reported by Mr. Serjeant [k] *Salkeld*, wherein the contrary Opinion is said to have been holden.

Before I come to the Third Point, *viz.* The Authority of the Sheriff as Judge of the Torn, in Relation to the Appointment of Constables, I shall in brief premise some Considerations concerning the Antiquity and Nature of the Office of a Constable.

Sect. 33. And first, as to the Antiquity of the Office of a Constable, it [l] seems to be the better Opinion, That both Constables of Hundreds, which are commonly called High Constables, and also Constables of Tithings, which are at this Day commonly called Petit Constables or Tithingmen, and were anciently called Chief Pledges, were by the Common Law, and not first ordained by the Statute of *Wincheſter*, *cap.* 6. as it is holden by [m] some that they were; for that Statute doth not say, That there shall be such Officers constituted, but clearly seems to suppose that there were such before the making of it.

Sect. 34. As to the Nature of this Office, there seems to be no Doubt but that the [n] original Institution of it was for the better Preservation of the Peace; for which Purpose a Constable is said to be authorized by the Common Law to [o] arrest Felons, and also all suspicious Persons that go abroad in the Night, and sleep by Day, or resort to Bawdy-Houses

[a] 3 H. 7. 4. 6. B. 8 Co. 41. b. 1 Rol. Rep. 76. Noy 17. *Query* Het 62.
[b] 1 Bulst. 53. 11 H. 7. 14. a. 21 H. 7. 40. b. 3 Mod. 138. Cro. El. 698, 748. Moor 574. pl. 789, 607. pl. 839. 2 Keb. 745. Salk. 108.
[c] 10 H. 6. 7. Co. Lit. 295. Fit Ley, 5. 43. 2 Rol. Abr. 106. pl. 1, 2, 8.
[d] *See* Kitchin 51, 52, 53.
[e] *See* Kitchin 51, 52, 53. Co. Entr. 573. 1 Rol. Abr. 468 pl. 6. Cro. Jac 382.
[f] 1 Rol. Abr. 468. pl. 6. 2 Rol. Abr. 136. 1 Rol. Re. 201. Aleyn 78. 5 Mod. 130, 131.
[g] Co. Ent. 573.
[h] 3 Leon. 7, 8. Moor 75. pl. 205. Co. Ent. 573. Bro. Leet 37.
[i] 8 Co. 41. b. Keilw. 66. b. Cro. Jac, 382. 1 Rol. Rep. 201. 1 Rol. Abr. 468. pl. 6. Contra Bro. Leet 37.
[k] Salk. 131. *See* 5 Mod. 96, 130, 131.
[l] Salk. 175, 381. 12 H 7. 18. a. Owen 105. Finch 336. Kitch. 47, 48. 4 Inst. 265. Poph. 13. Contra Cro. El. 375, 376. Lamb. Constables 5, 9, 10. 6 Co. 77. b.
[m] Lamb. Constable, 5. 4 Inst. 267.
[n] *See the Books cited*, Sect. 33.
[o] *See* Ch. 12.
[p] Kitchin 48. 13 H 7. 10 b.

Houſes, or keep ſuſpicious Company, and to ſuppreſs *Affrays: And to the ſame End alſo it [a] ſeems, That he ought by the ancient Common Law, to preſent at the Torn or Leet all thoſe within his Precinct, who have not been admitted into ſome Tithing and ſworn to the King's Allegiance; and it ſeems that he ſtill ought by the Law in [b] uſe at this Day, to preſent all Offences inquirable in the Torn or Leet; yet in the Oath ſet down by *Kitchin*, he only ſwears to preſent all Bloodſheds, Outcries, Affrays, and Reſcouſes done within his Office.

*B. 1 Ch 63.
[a] Lamb. Conſtable, 5,6,&c 45 E 3. 27.
[b] *See* Raſt. Entries 151. Crompt. 212, Dalt. Sheriff 388. Kitchin 47.

Sect. 35. Alſo it is [c] ſaid, That a Conſtable was at the Common Law a ſubordinate Officer to the Conſervators of the Peace; and conſequently ſince the Office of ſuch Conſervators hath been diſuſed, and Juſtices of Peace conſtituted in their Stead, it hath been always holden, That the Conſtable is the proper Officer to a Juſtice of Peace, and bound to execute his Warrants; and therefore it hath been [d] reſolved, That where a Statute authorizes a Juſtice of Peace to convict a Man of a Crime, and to levy the Penalty by Warrant of Diſtreſs, without ſaying to whom ſuch Warrant ſhall be directed, or by whom it ſhall be executed, the Conſtable is the proper [e] Officer to ſerve ſuch Warrant, and indictable for diſobeying it.

[c] Salk 380, 381.
[d] 5 Mod. 130. Salk. 175.
[e] Salk. 381. 2 Rol. Rep. 78.

Sect. 36. Yet in as much as the Office of a Conſtable is wholly miniſterial and no way Judicial, it ſeems, That he may appoint a Deputy to execute a [f] Warrant directed to him, when by Reaſon of Sickneſs, Abſence, or otherwiſe, he cannot do it himſelf. For the Publick Good requires, That there ſhould be always ſome Officer ready at Hand to execute ſuch Warrants, and the too rigorous Reſtraint of the Service of them to the proper Officer, could not but ſometimes Cauſe a Failure of Juſtice; yet I do not find it ſettled, That a Conſtable can make a Deputy without ſome ſuch ſpecial Cauſe.

[f] 1 Rol. Abr. 591. A. Moor 845. Crompt. 222. 3 Bulſt 77. Dalt. cap. 1. 1 Rol. Rep. 274. 1 Sid. 355. 1 Lev. 233. March 30. *Quære* 2 Keb. 309. 1 Sid. 355.

For the better underſtanding of the Authority of the Sheriff, as Judge of the Torn, in Relation to the Appointment of Conſtables, I ſhall conſider the following Particulars:

1. Whether the Sheriff in his Torn hath Power to make or remove a Conſtable.
2. What Perſons are privileged from being Conſtables.
3. In what Manner Perſons duly choſen Conſtables, may be puniſhed for refuſing to be ſworn.
4. What Remedy Perſons having a Right to this Office, or to be diſcharged, may have to be admitted into, or reſtored to it, or diſcharged of it.
5. What Power Juſtices of Peace have in Relation to theſe Matters.

Sect. 37. As to the firſt Particular, *viz.* Whether the Sheriff in his Torn, hath Power to make or remove a Conſtable, it being ſaid in ſome [g] Books, That both High and Petit Conſtables are to be choſen and appointed by the Sheriff in his Torn; and by [h] others, that they are to be choſen by the Decennary, it ſeems difficult to determine to whom this Power doth of common Right belong; yet it ſeems clear, That whether a Conſtable be to be choſen by the Sheriff or Decennary, yet he is to be ſworn and placed in his Office by the Sheriff, as being judge of the Court. Alſo it ſeems certain, That a Cuſtom for chooſing a Conſtable either Way, is good; and it ſeems to have been the Opinion of the Makers of 13 & 14 *Car.* 2. 12. That the Lords of the Courts-Leet have this Power of Common

[g] Dalt. Sheriff 400. 1 Rol. Rep. 34
[h] 2 Jones 212. Lamb. Conſtable 8. Salk 175.

Common Right; for the ſaid Statute, on the Neglect of ſuch Lords to appoint a Conſtable, gives to Juſtices of Peace the ſole Power of making one; from whence it ſeems probable, That the Makers of that Statute thought that the like Power did originally belong of common Right to ſuch Lords, and conſequently to the Sheriff in his Torn, where there is no Court-Leet: But [a] it hath been ſaid, That a Cuſtom in a Town that the Inhabitants ſhall ſerve the Office of Conſtable by Turns, according to the Situation of their ſeveral Houſes, is not good; for that by ſuch a Courſe it may come to a Woman's Turn to be Conſtable, as Inhabitant of one of thoſe Houſes; yet we find ſuch Cuſtoms allowed to be good in later Books; and it ſeems, That the Conſequence of the Reaſoning abovementioned may well be denied, ſince ſuch Woman in ſuch Caſe may procure another to ſerve for her.

[a] Cro. Car. 389. 2 Keb. 309, 578. 1 Lev. 266. 1 Sid. 355.

Sect. 38. However it ſeems clear, That the Sheriff or Steward having Power to place a [b] Conſtable in his Office, have by Conſequence a Power of removing him.

[b] Bulſt. 174.

Sect. 39. As to the ſecond Particular, *viz.* What Perſons are privileged from being Conſtables, it [c] ſeems certain, That if a ſworn Attorney or other Officer of any of the Courts of *Weſtminſter-hall* be choſen into this Office, he may have a Writ of Privilege for his Diſcharge; for that all ſuch Officers, being bound to give their perſonal Attendance to ſuch Courts, ſhall be privileged from all ſuch inferior Offices, which it is apparent that for the moſt Part they cannot perſonally execute: And it hath been reſolved, That ſuch Officers ſhall have this Privilege, not only where there is no ſpecial Cuſtom concerning the Election of Conſtables, but [d] alſo where they are choſen by a particular Cuſtom, in reſpect of their Eſtates or otherwiſe; for that no ſuch Cuſtom ſhall be intended to be more ancient than the Uſages of thoſe Courts, and therefore ſhall give way to them; And upon the like Reaſons I find it [e] taken for granted, That practiſing Barreſters at Law, and the Servants of Members of Parliament, have the ſame Privilege, but I know not of any Reſolution to this Purpoſe.

[c] Noy 112, 113. March 30. Cro. Ca. 389. 2 Keb. 477.

[d] 2 Keb. 508. pl. 84. Cro. Ca. 389. 1 Lev. 265, 266.

[e] 1 Mod. 22. 2 Keb. 578. 1 Mod. 13.

Sect. 40. Alſo it hath been reſolved, That an [f] Alderman of *London* is not compellable to be a Conſtable, for that as an Alderman he is bound to be preſent in the City for the good Government of it.

[f] 1 Jon. 462. Cro. Ca. 585.

Sect. 41. But [g] it hath been holden, That a Captain of the King's Guards, being preſented to ſerve as Conſtable, in Purſuance of a Cuſtom in reſpect of his Lands in a Town, cannot claim this Privilege; for that notwithſtanding he be bound by his Office to perſonal Attendance on the King's Perſon, yet ſuch Office being of late Inſtitution, ſhall not prevail againſt an ancient Cuſtom: Alſo it [h] ſeems, That a practiſing Phyſician being choſen Conſtable in Purſuance of ſuch Cuſtom, has no Remedy for his Diſcharge; for that there are no Precedents of this Kind, and his Calling is private; yet if ſuch an Officer, or a [i] Gentleman of Quality who hath no ſuch Office, or a practiſing Phyſician, be choſen Conſtable of a Town, which has ſufficient Perſons beſides to execute this Office, and no ſpecial Cuſtom concerning it, perhaps he may be relieved by the King's Bench: But it [k] ſeems, That even a Cuſtom cannot exempt fitting Perſons from ſerving the Office of Conſtable, where there are not ſufficient beſides them to execute it. Yet theſe Points ſeem not to be ſettled, as appears by the various Opinions in the Books concerning this Matter, which are very differently reported.

[g] *See* 2 Keb. 309. 1 Sid. 272, 355. 1 Lev. 233. 1 Keb. 933.

[h] 2 Keb. 578. 1 Mod. 22.

[i] 1 Keb 439. Con. 2. Keb. 578.

[k] Sid. 272. *See* 1 Keb. 933.

Sect.

Sect. 42. It is alledged in the Petition of the *London* Surgeons, whereon the Statute of 5 *H.* 8. *cap.* 6. is made, *That the Wardens and Fellowſhip of the Craft and Myſtery of Surgeons infranchiſed in the City of* London, *not paſſing in Number twelve Perſons, for the continual Service and Attendance that they at all Hours and Times give to the King's People, have been exempted and diſcharged from all Offices and Buſineſs, wherein they ſhould uſe or bear any Manner of Armour or Weapon,* &c. And thereupon it is enacted and eſtabliſhed, *That from thenceforth the ſaid Wardens and Fellowſhip be diſcharged, and not chargeable of Conſtableſhip, Watch, and all Manner of Office bearing any Armour,* &c. *and alſo that the ſaid Act extend to all Barber-Surgeons admitted and approved to exerciſe the ſaid Myſtery of Surgeons, according to the Form of the Statute made in that Behalf, ſo that they exceed not, nor be at any Time above the Number of twelve Perſons.*

2 Keb 578. *Sect.* 43. And it ſeems, That by the Equity of this Statute, and the ancient Cuſtom of the Realm, all Surgeons have been allowed the like Privilege.

Sect. 44. Alſo it is enacted by 32 *H.* 8. 40. *That the Preſident of the Commonalty and Fellowſhip of the Science and Faculty of Phyſick in* London, *and the Commons and Fellows of the ſame, ſhall not be choſen Conſtables in the City of* London *or Suburbs of the ſame,* &c. Yet it ſeems to have been holden, That the Equity of this Act doth not extend to other Phyſicians not mentioned in it; perhaps for this Reaſon, becauſe Phyſicians have no ſuch ſpecial Cuſtom for their Diſcharge as Surgeons are ſaid to have.

Vide ſupra Sect. 41.

Sect. 45. Alſo it is enacted 6 *W.* 3. 4 which hath been continued by ſubſequent Statutes, *That all Perſons uſing the Art of an Apothecary, who have been brought up and ſerved as Apprentices in the ſaid Art for ſeven Years, according to the Statute of* 5 Eliz. *ſhall be freed and exempted from the Office of Conſtable, in the Counties and Places where they live, for ſo long as they uſe and exerciſe the ſaid Art.*

Sect. 46. As to the third Particular, *viz.* In what Manner Perſons duly choſen Conſtables may be puniſhed for refuſing to be ſworn, it ſeems, That no Perſon can lawfully be committed for ſuch Refuſal without more; but it is ſaid, That if the Party be preſent in the Court he may be fined, and that if he be abſent, and have a certain Time and Place appointed him for the taking of the Oath before a Juſtice of Peace, and have alſo expreſs Notice of ſuch Appointment, and be preſented at the next Court, for having refuſed to take it accordingly, he may be amerced: Alſo it ſeems, That in either Caſe he may be indicted either at the Seſſions of the Peace, or before Juſtices of *Oyer* and *Terminer*: And it is adviſeable in all Pleadings in any Action concerning ſuch a Fine or Amercement, and in all Indictments for ſuch Refuſal, ſpecially and expreſsly to ſet forth the Manner of every ſuch Election, Appointment, Notice, and Refuſal, and [a] before whom the Court was holden: And it hath been adjudged, That it is inſufficient to ſay in general, that the Party was [b] *Debito modo electus*, or *Legitime electus*, or that he had [c] Notice thereof, without ſetting forth the ſpecial Circumſtances of ſuch Notice, *&c.* Alſo it is [d] ſaid to have been adjudged, That an Indictment for not finding a ſufficient Perſon to ſerve the Office of Conſtable, without ſhewing that the Party refuſed to ſerve it himſelf, is inſufficient; and it is ſaid not to be ſufficient to ſhew, That a Man was preſented and returned to be a Chief Pledge, without ſhewing that there were other inferior Pledges.

Cro. Car. 567.
Co. Ent. 572.
5 Mod. 130.
Salk. 175.
8 Co. 38.

[a] 1 Mod. 24.
[b] 5 Mod. 96, 129.
[c] Aleyn 78.
5 Mod. 96, 129, 130, 131.
1 Keb. 418.
Vide ſupra fol. 66.
[d] 1 Keb. 416.
6 Co. 77. b.

Sect. 23.

Sect. 47. As to the fourth Particular, *viz.* What Remedy Perſons having a Right to be Conſtables or to be diſcharged, may have to be admitted into or reſtored to their Office, or diſcharged of it; it ſeems clear at this Day, That the Court of King's Bench having the ſupream Controll of all inferior Juriſdictions, may upon the Complaint of any Perſon apprehending himſelf to be unjuſtly aggrieved in any ſuch Reſpect, award a Writ to the Judge of the Court, thereby commanding him to ſwear, reſtore, or diſcharge the Party as the Caſe ſhall be; whereupon if ſuch Judge do not obey ſuch Writ, nor an *Alias* and *Pluries* to the ſame Purpoſe, nor return a ſufficient Cauſe to the Court to juſtify his not obeying it, the Court will at laſt award a peremptory *Mandamus*.

1 Rol. Abr. 535, *Letter* I. 541. pl. 5, 6. 2 Rol Rep 82. Con. 1 Bulſt. 174.

Sect. 48. Alſo it hath been holden, That a Perſon duly choſen Conſtable at a Court Leet, and refuſed to be ſworn by the Steward, may be relieved by the Seſſions of the Peace; but this Point ſhall be more fully conſidered in the next Section.

2 Jon. 212.

Sect. 49. As to the fifth Particular, *viz.* What Power Juſtices of Peace have in Relation to theſe Matters, it is obſervable, That the Conſtable being a principal Peace-Officer, and it being neceſſary for the Preſervation of the Peace, that every Vill ſhould be furniſhed with one; the Juſtices of Peace have ever ſince the Inſtitution of their Office, taken upon them as Conſervators of the Peace, not only to ſwear Conſtables which have been choſen at a Torn or Leet, but alſo to nominate and ſwear thoſe who have not been choſen at any ſuch Court, on the Neglect of the Sheriffs or Lords to hold their Courts, or to take Care that ſuch Officers are appointed in them; alſo it ſeems, That ſuch Juſtices have always uſed for good Cauſe to diſplace ſuch Officers which have been ſo choſen and ſworn by them; and this Power of Juſtices of Peace having been confirmed by the uninterrupted Uſage of many Ages ſhall not now be diſputed, but ſhall be preſumed to have been grounded on ſufficient Authority. And ſome have carried this Point ſo far, as to allow the Juſtices at their Seſſions to ſwear one who was choſen at the Leet, and unduly rejected by the Steward, who had ſworn another in his Place.

Salk. 175. pl. 1, 2. 176. 1 Mod. 13. 2 Jon. 212. 1 Bulſt. 174. Aleyn 78. Dalt. Ch. 121. fol. 366, 367. 1 Bulſt. 174. Salk. 176. Con. 1 Bulſt. 174.

Sect. 50. However it is certain, That Juſtices of Peace had Power to nominate and ſwear Conſtables on the Default of the Torn or Leet, before the Statute of 13 & 14 *Car.* 2. 12. Par. 15. and therefore, that they have ſuch Authority in ſome Caſes not mentioned in that Statute, which reciting, *That the Laws and Statutes for apprehending Rogues and Vagabonds had not been duly executed, ſometimes for want of Officers, by Reaſon Lords of Manors do not keep Court-Leets every Year for the making of them; doth enact, That in Caſe any Conſtable, Headborough, or Tythingman ſhall die or go out of the Pariſh, any two Juſtices of Peace may make and ſwear a new Conſtable, Headborough, or Tythingman, until the ſaid Lord ſhall hold a Court, or until next Quarter-Seſſions, who ſhall approve of the ſaid Officers ſo made and ſworn as aforeſaid, or appoint others, as they ſhall think fit; and if any Officer ſhall continue above a Year in his or their Office, that then in ſuch Caſe the Juſtices of Peace in their Quarter-Seſſions may diſcharge ſuch Officers, and may put another fit Perſon in his or their Place until the Lord of the ſaid Manor ſhall hold a Court as aforeſaid.*

See the Books cited in the precedent Section.

As to the fifth general Point of this Chapter, *viz.* What Kind of Offences are inquirable in the Sheriff's Torn, I ſhall premiſe the following Obſervations,

4 Inſt. 261. Crompt. 213.
1. That it is no certain Rule, That ſuch Offences as are omitted in 18 *E.* 2. concerning the View of Frank-Pledge are not within the Juriſdiction of the Torn or Leet.

Fitz. Torn, 5. infr. Sect. 52.
2. That Offences made Treaſon or Felony or in any other Manner, having a Reſtraint by Statute ſuperadded to that of the Common Law, are not inquirable here in Reſpect of any ſuch Statute, but only as Offences at the Common Law; for that the Juriſdiction of theſe Courts is wholly confined to Offences at Common Law.

Keilw. 66. b.
3. That no Offence whatſoever is cogniſable in any ſuch Court, unleſs it aroſe ſince the holding of the laſt Court.

Offences inquirable in this Court are either,

1. Capital, or
2. Not Capital.

The Capital are either,

1. Treaſons, or
2. Felonies.

[a] Cromp. 212. b. Dalt. Sheriff 292. 7 H. 6. 12. b. 10 H. 6. 7. a. *Quære* Bro. Leet 26. [b] 9 H. 6. 44 b. [c] Inf. Sect. 58. [d] Kitchin 8, 9, 22. H. P. C. 173. 6 H. 7. 4. b. 5. a. *See the next Section.*

Sect. 51. And firſt as to Treaſons, it is ſaid in [a] ſome Books, That the Sheriff in his Torn may inquire of them all in general, and in [b] others, that he may inquire of all which are not againſt the King's Perſon; but I can find no Reaſon given for this Diſtinction: And ſince it is a general Rule, That Offences are inquirable in this Court, in Reſpect of their being of a publick Nature, on which Account the loweſt Offences againſt the King, as [c] Mortmains and Purpreſtures, and ſuch like, are inquirable in it,; it ſeems ſtrange, That the higheſt ſhould be exempted. However it is [d] clear, That the Sheriff has no Power to inquire of any Offence made Treaſon by Statute, as of a Treaſon, but only as it was an Offence at Common Law.

[e] 10 H. 6. 7. a. Kitchin 9, 10. Cromp. 212. Dalt. Sheriff 392. [f] 9 H. 44. b. 22 E. 4. 22. b. 7 H. 6. 12. Fitz. Torn 5. 5. 40 Aſſ. 30. Bro. Leet, 18, 26. Finch 241. Kitchin 22. [g] Kitchin 22. 18 E. 2. View of Frankpledge. 2 Inſt. 181. 22 E. 4. 22. 6 H. 7. 4. b. 5. a. Fitz. Torn. 5. Leet 3.

Sect. 52. Secondly, As to Felonies, it is alſo generally ſaid in [e] ſome Books, That the Sheriff in his Torn may inquire of all Kinds of Felonies, and in [f] others, That he may inquire of all except of the Death of a Man, or Rape, of the firſt of which it is ſaid, That he cannot inquire, becauſe it is not a common Nuſance, but only a Wrong to a ſingle Perſon: But if this Reaſoning be the only Foundation of this Opinion, it ſeems difficult to maintain it; for if an Aſſault aud Battery of a ſingle Perſon being accompanied with Bloodſhed or Robbery, be inquirable in this Court, in reſpect of the Enormity of the Offence, and the Danger to the Publick from ſuffering ſuch Offenders to go unreſtrained, it ſeems ſtrange if ſuch an Aſſault proceed to Murder, that it ſhould not be inquirable in it alſo: But it is [g] ſaid, That the Sheriff cannot inquire of Rape as of a Felony, becauſe it is made a Felony by the Statute of *Weſtminſter* 2. 34. by which it is enacted, That he who raviſhes a Woman, ſhall have Judgment of Life and Member: But if this Statute had only repealed the 13th of *Weſtminſter* 1. (by which this Offence, which was a Felony at Common Law, was made a Treſpaſs only,) it ſeems that it would

would have reſtored the Juriſdiction of the Sheriff's Torn over it as a Felony, becauſe then it would have been a Felony by the Common Law again; but now it being a Felony only by the Statute, it is inquirable as a Treſpaſs only in this Court.

Offences not Capital inquirable in the Sheriff's Torn, are either,

1. Such as amount to an actual Treſpaſs, or
2. Such as do not amount to ſuch a Treſpaſs.

Sect. 53. And firſt, As to ſuch Offences amounting to an actual Treſpaſs it is agreed, [a] That an Aſſault and Battery is inquirable here, if there be any Bloodſhed in it, but otherwiſe not; becauſe in ſuch Caſe it is not looked on as a common Grievance, but as an Injury to a particular Perſon.

Sect. 54. Secondly, That all [b] Affrays are alſo inquirable here, for that they are *in terrorem Populi.*

Sect. 55. Thirdly, That the common [c] breaking of Hedges, Walls, or Dykes, may alſo be inquired of in this Court, but not the breaking of any particular Hedge, for that it is no common Grievance.

Sect. 56. Fourthly, Alſo it is commonly ſaid, That all [d] Pound Breaches may be inquired of in this Court, as being common Grievances, in direct Contempt of the Authority of the Law, by which Pounds are provided for the legal Detainment of Diſtreſſes till they ſhall be delivered by due Courſe of Law.

Sect. 57. Offences under the Degree of Capital, not amounting to an actual Treſpaſs, and inquirable in this Court, either immediately concerning the King's Intereſt, or do not.

Sect. 58. As to thoſe which immediately concern the King's Intereſt, it ſeems to be agreed, That all [e] Purpreſtures or Incroachments upon the King, and [f] Alienations in Mortmain, and [g] Seiſures of Treaſure-trove, or of [h] Waifs or [h] Eſtrays, or Goods [h] wrecked, belonging to the King, may be inquired of in this Court: But it ſeems [i] queſtionable, Whether a Preſcription in a Court-Leet to inquire of the Seiſure of ſuch Things belonging to the Lord of it, being a Subject, be good or not, ſince it is againſt the general [k] Rule of the Law for the Court-Leet to take Conuſance of Treſpaſſes done to the private Damage of the Lord, becauſe that would make him his own Judge?

Sect. 59. As to Offences of this Kind, which do not immediately concern the King's Intereſt, it ſeems to be a general [l] Rule, That all common Nuſances are indictable in this Court; as all Annoyances to common Bridges or Highways, [m] Bawdy-houſes, *&c.* and alſo all other ſuch like Offences, as [n] ſelling corrupt Victuals or expoſing them to Sale, [o] breaking the Aſſiſe of Beer and Ale, neglecting to hold a [p] Fair or Market in Purſuance of a Grant or Preſcription: Alſo it ſeems, That the keeping of [q] falſe Weights or Meaſures is indictable in this Court, whether it appear that they were actually made Uſe of or not: Alſo it is ſaid, That all common Diſturbers of the Peace may be here indicted, as [r] Barretors, [r] common Scolds, [r] Eves-droppers, and alſo all common Oppreſſors, as [s] Uſurers, *&c.* and alſo all [t] dangerous and ſuſpicious Perſons as Vagabonds; or thoſe who go abroad in the Night, and ſleep in the Day, or thoſe who inordinately haunt Taverns, having no viſible Means to live by, *&c.* And alſo all [u] Suitors to the Court who ſhall make Default, *&c.* And [x] alſo all thoſe who ſhall levy a Hue and Cry without Cauſe, or ſhall neglect to levy one where they ought, or to purſue one rightly levied.

Sect.

[a] 8 E. 4. 5. b. Dy. 233, pl. 14. 1 R. 3. 1. a. 4 H. 6. 18. 18 E. 2 View of Frankpledge. Kitch. 37, 38.
[b] 4 H. 6. 10. a. 1 R. 3. 1. a. Bro. Leet 15. Kitchin 11.
[c] Kitch. 11. Bro. Leet 26. 22 E. 4, 23. Finch 241.
[d] Dalt. Sheriff 394. Kitch. 11, 37. Contra 4. Leon. 12.
[e] Dalt. Sheriff 393.
[f] Kitch. 23, 38, 39.
[g] Kitch. 40. 18 E. 2. View of Frank-
[h] Kitch. 12. 13, 23, 40. Dalt. Sheriff 393. Crompt. 213.
[i] 44 E. 3. 19. pl. 14.
[k] 1 Saunders 135. Raym. 160. 12 H. 4. 8. b.
[l] 1 R. 3. 1. 4 H. 6. 10. 22 E. 4 22, 23. 1 Rol. Abr. 541, 542, 543.
[m] Kitch. 11.
[n] 1 R. 3. 1. Bro. Leet 1. 4 Inſt. 261. Kitch. 11. 23.
[o] 2 Inſt. 72. 4 E. 4 24. 4 Inſt. 262. Rol. Ab. 543.
[p] Cromp 212.
[q] 18 E. 2 View of Frankpledge. Con. Kitch. 11. b. Dalt Sh. 395.
[r] Kitch. 11. Hob 246.
[s] Cromp. 212. Dalt. Sh. 394
[t] 18 E. 2 View of Frankpledge. Kitch. 11.
[u] Kich. 10. b.
[x] Dalt. Sheriff 394. 18 E. 2. View of Frankpledge.

Sect. 60. Also [a] it is said, That every Vill within the Precinct of a Torn, is indictable in it for not having a Pair of Stocks, and shall forfeit five Pounds.

Sect. 61. Also by [b] Statute, many other Offences are inquirable in this Court, which it would be too long to enumerate in this Place.

Sect. 62. But it hath been [c] resolved, That a Man cannot be amerced in a Court-Leet for surcharging a Common, because this only concerns the private Interest of the Inhabitants.

Sect. 63. Yet it hath been [d] holden, That if there be a By-Law made in a Court-Leet, in Pursuance of a Custom to make By-Laws, That no one shall receive a poor Man to be his Tenant, who shall be chargeable to the Town, under a certain Penalty; and afterwards an Inhabitant offend against such By-Law, he may be presented at the Court-Leet and compelled to pay such Penalty: But if such By-Laws be valid, it seems clear, That they depend entirely on the Custom, and are not binding of common Right; for that the Court-Leet, as such, hath nothing to do with such Matters of a private Nature: And how far any such Court may receive, from a special Custom, a new collateral Power of a different Nature from what naturally belongs to it, may deserve to be considered; but it [e] seems, That of common Right any Court-Leet, with the Assent of the Tenants, may make By-Laws under certain Penalties, in Relation to Matters properly within the Conusance of such Court, as the Reparation of the Highways, *&c.* Also there [f] seems to be no Doubt, but that by Custom a Court-Baron may make By-Laws, for the well regulating of Commons and such like private Matters; and therefore where a Court-Leet and Baron are holden together at the same Place, as they usually are, it seems, That what is transacted therein in Relation to publick Matters, shall be applied to the [g] Jurisdiction of the Court-Leet, and what is done in Relation to private Matters, shall be intended to be done by the Court-Baron.

Sect. 64. As to the sixth general Point of this Chapter, *viz.* Within what Place Offences indictable in the Sheriff's Torn must arise, it seemeth that it is not material, Whether such [h] Offences did arise within the Hundred in which the Torn is holden or not; for though the Sheriff ought to hold his Torn in every particular Hundred, yet it seems, That in each of them he holds it for the whole County; and it is certain, That he hath a general Jurisdiction throughout the whole; yet it seems, That the Jurors shall not be charged on their [i] Oaths to present any Offences, but those arising within their particular Hundreds: Also it is provided by the Statute of *Marlbridge*, *cap.* 10. That those who have Tenements in different [k] Hundreds, shall not be compelled to come to any Torn, but only in the Bailiwick wherein they shall be conversant: Also it [l] seems clear, That no Offence arising within the Precincts of a Leet is inquirable in the Torn, unless there have been a Neglect to present it in the Leet: But after such a Neglect it seems the better [m] Opinion, That it is inquirable in the Torn, least otherwise there should be a Failure of Justice: Yet it seems certain, That in pleading you [n] cannot justify the Proceedings of the Sheriff's Torn against any Offence arising within a Leet, without expressly alledging that the Leet had neglected to inquire of it; for that such a Neglect is not to be presumed, where it doth not appear.

Sect. 65. As to the seventh general Point of this Chapter, *viz.* By what Jurors, and in what Manner, Indictments in the Sheriff's Torn ought to be found, it is enacted by the Statute of *Westminster*, 2. 13. *That the Sheriff shall take no Inquest either* ex Officio, *or by Virtue of the King's Writ,*

[a] Kitch. 13. *See the next Chapter.*
[b] *See* Kitch. 12. 2 Danv. Ab. 291.
[c] 1 Rol. Abr. 541. 2 Rol Abr. 83. pl. 7.
[d] 1 Rol Ab. 542. pl. 11, 12. Lane 55, 56.
[e] 11. H. 7. 14. 21 H 7. 40. b. 5 Co. 63. Hob 212. Kitch. 45.
[f] 1 Danv. 735. pl. 10. 737. pl. 1, 2, 3. Kitch. 78.
[g] *See* Ch. 11. Sect. 6.
[h] Dalton's Sheriff 385. Finch 241, 242. Cro. Jac. 551. *seems contrary.*
[i] Cromp. 212. Dalt. Sheriff 388.
[k] 2 Inst 120, 122.
[l] 1 Rol. Ab. 543. *Letter* D. Crompt. 212. a. Co. Lit. 168. b. Bro. Presentment 1. Dalt. Sheriff 395, 396. 3 Keb 230.
[m] *See the Books above cited, and* 10 H. 4. 4. a. 12 H. 7. 18. Mo. 607. Finch 246. Cro. Jac. 584, 551. Cont. 4 Inst. 261.
[n] Cro. Jac. 551.

2 Inst, 387,

Writ, but by twelve lawful Men at the leaſt, who ſhall put their Seals to ſuch Inquiſitions; and the ſame is alſo provided as to Bailiffs of Franchiſes.

Sect. 66. In the Conſtruction of this Statute it hath been holden, That if there be more than twelve Jurors, and all agree to the Inquiſition, all muſt ſet their Seals to it; but that it is ſufficient, if twelve of them only agree, for thoſe twelve to ſet their Seals. Dalt. Sheriff 389.

Sect. 67. And it is farther enacted by 1 *R.* 3. *cap.* 4. *That no Officer return or impanel any Perſon to be taken or put in any Inquiry in any Sheriff's Torn, but ſuch as be of good Name and Fame, and having Freehold to the yearly Value of* 20 s. *or Copyhold to the yearly Value of* 26 s. 8 *d. on Pain of* 40 s. &c. *And that every ſuch Indictment before any Sheriff in his Torn otherwiſe taken, ſhall be void.*

Sect. 68. And *Note*, That Courts-Leet ſeem to be within the Letter of the ſaid Statute of *Weſtminſter* 2. and are ſaid by ſome to be within the Equity of the ſaid Statute of 1 *R.* 3. but this ſeems queſtionable; for it is ſaid, by ſome Books, That any Perſon happening to be preſent at a Court-Leet, or to be riding by the Place where it is holden, may for the want of Jurors be compelled by the Steward to be ſworn, whether he be Reſident within the Precincts of the Leet or not; by which it ſeems to be implied, That any Perſon whatſoever is capable of being put upon the Jury in a Court-Leet. 2 Inſt. 388. S. P. C. 85. b. 7 H. 6 13. a. 12 H. 7. 18 b. Bro. Leet 14. 3 H. 7. 4. b.

Sect. 69. And to prevent the altering or imbezilling of any ſuch Indictment, it is enacted by 1 *E.* 3. Stat. 2. Ch. 17. *That the Sheriffs and Bailiffs of Franchiſes, and all other that do take Indictments in their Torns, or elſwhere, where Indictments ought to be made, ſhall take ſuch Indictment by Roll indented, whereof the one Part ſhall remain with the Indictors, and the other Part with him that taketh the Inqueſt; ſo that the Indictments ſhall not be imbezilled as they have been in Times paſt; and ſo that one of the Inqueſts may ſhew the one Part of the Indenture to the Juſtices, when they come to make Deliverance.* 2 Inſt. 388. S. P. C. 85 a

Sect. 70. And there is no Doubt, But that this Statute extends as well to Courts-Leet, as to the Sheriff's Torn. Keilw. 141. a. 148. a.

Sect. 71. Alſo there are many particular Cuſtoms and Uſages in Relation to the taking of Indictments in theſe Courts; but it ſeems to have been anciently the moſt general Courſe, to impanel not only a Grand Jury, but alſo a Jury of twelve Men, which was commonly called the Petit Jury; and that all Offences were firſt preſented by the Headboroughs, and the Preſentments affirmed by the Petit Jury, before they were brought to the Grand Jury: However it ſeems, That no Exception can be taken to any ſuch Indictment, in Reſpect of the Non-obſervance of any ſuch Cuſtom or Uſage; for that no Averment lies againſt the Acts of a Court of Record, and every Judge of ſuch Court ſhall be preſumed to act according to the Rules of it. Dalt. Sheriff 388, 389. Crompt. 212, 213. Keilw. 66. b. 9 H. 6. 44 b.

Sect. 72. What is above ſaid concerning Indictments taken before the Sheriff in his Torn, is to be intended of ſuch only as are taken before him *ex Officio*; for that he is reſtrained to take any ſuch Indictment, by Virtue of any Writ or Commiſſion by 28 *E.* 3. 9. *Which reciting that the People had ſuffered many Miſchiefs, for that Sheriffs of divers Counties, by Virtue of Commiſſions and general Writs granted to them at their own Suit, for their ſingular Profit to gain of the People, had made and taken divers Inqueſts, to cauſe to indict the People at their Will, and had taken Fine and Ranſom of them to their own Uſe, and had delivered them; whereas ſuch Perſons indicted were not brought before the King's Juſtices to have Deliverance, doth thereupon enact, for to eſchew all ſuch Miſchief, that all ſuch Commiſſions and Writs before made be utterly repealed, and that from thenceforth no ſuch Commiſſions nor Writs ſhall be granted.*

F. N. B. 92. c. 144. i. 250. A. Cro. E. 371. Salk. 190. 2 Inſt. 388. H. P. C. 103, 104, 173. S. P. C. 77. F. G. 84. A. Dalt. Sheriff 388, 389. 3 Mod. 238. Book 1. Ch. 29. Sect. 20, 24.

Sect. 73. Yet it ſeemeth not to be clearly ſettled, Whether by Virtue of this Statute, all ſuch Writs and Commiſſions, and the Proceedings thereon, be made wholly void or not?

Sect. 74. As to the eighth general Point of this Chapter, *viz.* In what Manner Indictments in the Sheriff's Torn are to be proceeded upon, it is recited by 1 *E.* 4. 2. *That many of the King's People by inordinate and infinite Indictments and Preſentments of Felonies and other Offences, taken before Sheriffs at their Torns or Law-Days, (which were oftentimes affirmed by Jurors having no Conſcience, nor any Freehold, and often by the Sheriff's menial Servants) had been arreſted and impriſoned, and conſtrained to make grievous Fines and Ranſoms, after which they had been enlarged out of Priſon, and the ſaid Indictments and Preſentments imbezilled and withdrawn.* And thereupon it is enacted, *That all indictments and Preſentments before any of the King's Sheriffs in his Counties, except in* London, *their Under-Sheriffs, Clerks, Bailiffs or Miniſters at their Torns or Law-Days, they nor any of them ſhall have Power to attach, arreſt, or put in Priſon, or to levy or take any Fine or Amercement of any Perſon ſo indicted or preſented, by Reaſon of any ſuch Indictment or Preſentment, but that the ſaid Sheriffs and Under-Sheriffs, Clerks or Bailiffs, and their Miniſters, ſhall deliver all ſuch Indictments and Preſentments to the Juſtices of Peace, at their next County-Seſſions on Pain of* 40 l. *And that the ſaid Juſtices of Peace ſhall have Power to award Proceſs upon all ſuch Indictments and Preſentments as the Law doth require, and in like Form as if the ſaid Indictments and Preſentments were taken before the ſaid Juſtices of Peace; and alſo to arraign and deliver all ſuch Perſons ſo indicted and preſented before the ſaid Sheriffs,* &c. *And ſuch Perſons which ſhall be indicted or preſented of Treſpaſs, ſhall make ſuch a Fine as ſhall ſeem lawful by their Diſcretions. And the Eſtreats of the ſaid Fines and Amercements ſhall be inrolled, and by Indenture be delivered to the ſaid Sheriffs, Under-Sheriffs, their Clerks, Bailiffs, or Miniſters, or ſome of them, to the Uſe and Profit of him that was Sheriff at the Time of ſuch Indictments or Preſentments taken. And if any of the ſaid Sheriffs, their Under-Sheriffs, Clerks, Bailiffs, or their Miniſters, do arreſt, attach, or put in Priſon, or cauſe any Fine or Ranſom to be taken, or levy any Amercement, of any Perſon or Perſons ſo indicted or preſented, by Reaſon or Colour of any ſuch Indictment or Preſentment taken before them at their Torns or Law-Days above rehearſed, before that they have Proceſs from the ſaid Juſtices of Peace, or Eſtreats delivered out, of the ſaid Indictments or Preſentments ſo brought, delivered, and preſented to them, that then the Sheriffs which ſo do, ſhall forfeit an Hundred Pounds.*

S. P. C. 87. D. 4 E. 4. 31. a. Fitz. Torn 3.

Sect. 75. It is obſervable, That by the Words of this Statute, Juſtices of Peace may award Proceſs on any ſuch Indictments, in like Manner as if they had been taken before themſelves; and yet it is clear, That if the Sheriff's Torn had no Authority to take the Indictment removed before ſuch Juſtices, they have no Power to proceed upon it, as they might have done if it had been taken before themſelves; for the Statute in giving them ſuch Power to proceed upon Indictments in the Sheriff's Torn, muſt be intended to mean ſuch only as were there lawfully taken, not thoſe which were void *ab initio*, as being taken *coram non Judice*; nor is there the leaſt Intimation in the Statute of an Intent to inlarge the Sheriff's Power in taking Indictments, but the whole Purport of it is to reſtrain him from proceeding on them. And to this Purpoſe it hath been ſo largely conſtrued, That not only the Judge of the Court is puniſhable for awarding ſuch Proceſs, but alſo the Officer for obeying it.

1 Jon. 301. Cro. Ca. 275.

Sect. 76. As to the ninth general Point of this Chapter, *viz.* In what Manner Indictments in the Sheriff's Torn are to be traverſed and determined; it ſeems to be [a] agreed, That a Preſentment by [b] twelve or more in a Torn or Leet, of any Offence within the Juriſdiction of the Court, being neither Capital nor concerning any Freehold, ſubjects the Party to a Fine or Amercement without any farther Proceeding, and binds him for ever after the Day on which it is found, and admits of no Traverſe to the Truth of it; but [c] ſome ſay, That the Party may have a Writ of falſe Preſentment againſt the Jurors, the ſame Day on which the Indictment is found, yet it ſeems agreed, That no Inſtance can be ſhewn of any ſuch Writ being actually brought: But if the Preſentment concern the Party's Life or [d] Freehold, as if it charge him with not repairing ſuch a Highway, which he is charged to be bound to repair by the Tenure of his Land; it ſeems clear, That he may remove it into the King's Bench and traverſe it; but not if it barely charge his Perſon, as for digging a Ditch in the Highway, or not cutting the Branches of his Trees hanging over it, *&c.* Alſo it [e] ſeems, That a Man may in like Manner traverſe an Indictment of an Offence wholly out of the Juriſdiction of a Court-Leet; as of an Affray or Nuſance done out of the Precinct of it, or of the Non-Appearance of a Perſon at a Leet, who lives out of the Precinct of it. But if the Affray or Nuſance were within the Precinct of the Leet, it ſeems, That no one can traverſe it in Reſpect of his own not living in it; and that a Perſon who lives within the Precinct of a Leet, ſhall have no Traverſe to a Preſentment for not appearing at it.

[a] Finch 386. Keilw. 52. a. 66. b.
[b] 3 Mod 138. Dyer 13. pl. 45. Keilw. 141. a. 45 E. 3. 26. b. 27. a. *See Cowp. 458.*
[c] Fitz. Bar. 271. Keilw. 66. b. 41 Ed. 3. 28.
[d] 5 H. 7. 4. a. Br. Trav. 183. Keilw. 52, 66, 67. Dy. 13. pl. 64.
[e] Keilw. 66, 67. 41 E. 3 27.

Sect. 77. But it ſeems certain, That at this Day, neither the Torn nor Leet, have any Power to try any Traverſe whatſoever, as hath been more fully ſhewn, *Sect.* 13. But it is certain, That the Juſtices of Peace may by Force of the abovementioned Statute of 1 *E.* 4. try a Man indicted of Felony before the Sheriff in his Torn: Alſo it ſeems, That they may try a Perſon upon any other Indictment in the Torn, which is traverſable at Common Law, but that they have no Power to take any Traverſe of any other Indictment in the Torn; for that the Words of the Statute are only, *That they may award Proceſs on any ſuch Indictments, as if they had been taken before themſelves, and alſo arraign and deliver the Perſons indicted,* which muſt be intended of thoſe indicted of Felony, who only are ſaid to be arraigned, *And that Perſons indicted of Treſpaſs, ſhall make Fines,* &c. *by their Diſcretion,* without ſaying, That they ſhall be tried; by which it ſeems to be implied, That Perſons ſo indicted ſhall be fined, as they uſually were before in the Torn, and ſtill are in the Leet, and that in ſome Caſes without any farther Trial, as is more fully ſhewn in the precedent Section.

CHAP.

CHAP. XI.

Of the Court-Leet.

Finch 246.

Sect. 1. A Court-Leet is a Court of Record having the same Jurisdiction within some particular Precinct, which the Sheriff's Torn hath in the County: And therefore since it hath been shewn in the precedent Chapter, at what [a] Time and in what Place the Sheriff's Torn is to be holden, and what Persons owe Suit to it, and [b] what Authority the Judge of it hath in Relation to his Proceeding on [c] Indictments, and also in Relation to [d] Fines and Amercements, and the [e] Appointment of Constables; and having also shewn what [f] Kind of Offences are inquirable in this Court, and within what [g] Place such Offences must arise, and by what [h] Jurors, and in what Manner, Indictments in it are to be found, and in what Manner they are to be [i] proceeded upon, traversed and determined; and since the Court-Leet hath regularly the very same Jurisdiction with the Sheriff's Torn as to all these Points, except in some special Cases, which have been already taken Notice of in the Chapter concerning the Sheriff's Torn; I shall refer the Reader to the said Chapter for all these Particulars, and shall only consider in this Place,

[a] Sect. 45, &c.
[b] Sect. 10, &c.
[c] Sect. 13, &c.
[d] Sect. 17, &c.
[e] Sect. 33, &c.
[f] Sect. 51, &c.
[g] Sect. 64, &c.
[h] Sect 65, &c.
[i] Sect. 74, &c.

2 Inst. 71, 72.
22 Ed. 4. 22.

1. The End of instituting the Court-Leet.
2. How far it exempts those who live within its Precincts from the Torn.
3. How far it is subject to the Oversight of the Torn.
4. For what Causes it may be forfeited.
5. What ought to be the Form of a Caption of an Indictment in it.

Sect. 2. As to the first Point it seems, That anciently all People who now owe Suit to any Court-Leet, were bound to come to the Sheriff's Torn, in order there to take the Oath of Allegiance to the King, and to be incorporated into some Tithing, and for such other Purposes as are set forth more at large in the precedent Chapter, *Sect.* 2. But it being more for the Ease of the People, to have Courts of this Kind holden in their own Townships or Manors; by Degrees, Grants of such Courts were obtained from the King for most Manors and Towns, not only by the Lords of Manors, but also by other Persons, who had no Lands in the Places for which they obtained such Grants: And for a Recompence to such Grantees, for the Charge and Trouble they were supposed to have been at in procuring such Grants, it was usual for the Inhabitants who had the Benefit of them, to agree to pay a certain Sum of Money, called Capitage, or *certum Letæ*, &c. at every such Court-Leet; and for the Non-payment of this Duty or Refusal to present it, such Grantees may prescribe to amerce the Defaulters, and to distrain for the Amercement; but no such Prescription shall be allowed for any other Matter whatsoever of a private Nature.

12 H. 7. 18.
2 Inst. 71, 72.
1 Jon. 283.
6 Co. 77. b.

Dyer 30. pl. 209.

13 H. 4. 9.
11 Co. 42.
1 Rol. Rep. 32, 73.
1 Rol. Abr. 211. A. C.

Sect.

Sect. 3. As to the ſecond Point, *viz.* How far a Court-Leet exempts thoſe who live within the Precincts of it from the Torn, it ſeems to be a general [a] Rule, That no Man can be within two Leets at the ſame Time, and in the ſame Reſpect; from whence it follows, That he who reſides within the Precincts of a Leet, the Lord whereof doth duly hold his Court, cannot be compelled to come to the Torn, or any other ſuperior Leet, for the taking the Oath of Allegiance, or any other ſuch like Purpoſe, which may be as well anſwered by his Attendance at his own Leet: Yet if ſuch private Leet have not the general Juriſdiction of the Torn, but be [b] ſpecially granted for two or three Articles of it only; it ſeems, That the Inhabitants within its Precinct muſt attend the Sheriff's Torn for all ſuch Matters of which ſuch private Leet hath no Juriſdiction: Alſo it [c] ſeems to be a good Preſcription for a Grand Leet, (to which other inferior Leets may be ſubordinate in the ſame Manner as that is to the Torn,) to oblige the Chief Pledges, and a certain Number of the Inhabitants of every Town within its Precinct, to appear at every ſuch Grand Leet, to inquire of ſuch Offences as have not been inquired of in the inferior Leets.

[a] Dalt. Sheriff 402, 403. 1 Jon. 283. 6 Co. 77. b. 18 H. 6. 13. Fitz Leet 1. Cro. Jac. 584. *See* Ch. 10. Sect. 12. Con. Kitch. 34. 1 Rol. Abr. 542. b. [b] Keilw. 141. a. 142. a. 2 Rol. Abr. 203. pl 7. [c] Cro Jac 583. Raym. 204. Cro. Car. 75, 76. *See* Ch. 10. Sect. 12, 64,

Sect. 4. As to the third Point, *viz.* How far the Court-Leet is ſubject to the Overſight of the Torn; it is ſaid, That the Sheriff's Torn as an [d] Overſeer of this Court, is to inquire whether the Tithings be whole or no, and to preſent Defaults that are not redreſſed in the Leet; and it ſeems alſo, That it may of common Right inquire of the Concealment of Offences inquirable in Leets, and of the Defaults of the Lords of ſuch Courts: However it [e] ſeems clear, That a Preſcription to this Purpoſe is good. And there is no Doubt, but that if a Leet be [f] ſeized into the King's Hands, all thoſe who owed Suit to it ought to come to the Torn.

[d] Finch 246. *See* Ch. 10. Sect. 64. Dalt. Sheriff 387, 391. [e] Cro Jac. 584. [f] 2 Rol. Abr. 203 pl. 7. Finch 246. [g] Co. Lit. 233. a. Kitch. 33. Cro. Jac. 155. 9 Co. 50. 2 Rol. Abr. 155. O. 11 Ed. 4. 1. 2 H. 7. 11. b. [h] 1 Jon. 383. Keilw. 148. b. 152. a. [i] Kitch. 33. [k] 1 Jon. 283. [l] Fitz Leet 12. Cro Eliz. 125. 698. Mo. 573, 574, 607. 1 Jon. 283. [m] Cro. Eliz. 698. Mo. 607. [n] Kitch. 13. a. Carter 29. Con. Moor 374, 573. 1 Jon. 283. [o] Vide ſupra Ch 10 Sect. 9. Salk. 195.

Sect. 5. As to the fourth Point, *viz.* For what Cauſes a Court-Leet may be forfeited, it ſeems, That this being a Franchiſe not intended to be granted for the private Benefit of the Grantee, but for the Good of the Publick, from the more eaſy and convenient Adminiſtration of Juſtice, ſhall not only be forfeited by Acts of groſs and palpable Oppreſſion and Injuſtice, [g] but alſo by bare Omiſſions, in not making it anſwer the End of its Inſtitution; as in the not [h] puniſhing Offenders in the ſame Manner as the Law requires, or in [i] neglecting to hold a Court when it ought to be holden, (at leaſt if ſuch Neglects be often repeated, and without a reaſonable Excuſe,) or in not [k] providing an able Steward to diſcharge the Office, or in not taking Care to have ſuch other Officers, or other Things as are neceſſary for the Execution of Juſtice, as Conſtables, and Ale-taſters, *&c.* and [l] Pillory and Tumbrel; but it is [m] ſaid, That a Vill may be bound by Preſcription to provide a Pillory and Tumbrel, and [n] that every Vill is bound of common Right to provide a Pair of Stocks. *Quære.*

Sect. 6. As to the fifth Point, *viz.* What ought to be the Form of the Caption of an Indictment in a Court-Leet, it hath been [o] reſolved, 1. That the Caption of an Indictment, *ad Cur. Viſ. Franc. Pleg. cum Cur. Baron. &c.* is good; for that the Words *cum Cur. Baron.* ſhall be rejected; and it cannot but be intended that the Indictment was taken by that Court, which alone hath the Colour of Authority to take it.

Sect. 7. 2. That the not ſetting forth in the Caption, whether ſuch Court be holden by Grant or Preſcription, is helped by the Multitude of Precedents.

Salk. 200.

CHAP. XII.

Of Arreſts by private Perſons.

HAving thus endeavoured to ſhew the Nature of the Courts which have Juriſdiction over criminal Offences, I am now to ſhew in what Manner Offenders are to be proceeded againſt by ſuch Courts; and in Order hereto ſhall conſider,

1. How they are to be apprehended.
2. In what Manner and in what Caſes they are to be bailed.
3. In what Caſes and in what Manner they are to be committed to Priſon.
4. How far they and their Aſſiſtants are puniſhable for an Hindrance in bringing them to publick Juſtice.

As to the firſt of theſe Points I ſhall conſider,

1. In what Manner ſuch Offenders are to be apprehended by private Perſons.
2. In what Manner by publick Officers.
3. In what Caſes it is lawful to break open Doors in order to apprehend them.

As to Arreſts of ſuch Offenders by private Perſons, I ſhall examine,

1. Where Arreſts of this Kind are commanded and injoined by Law.
2. Where they are permitted by Law.
3. Where they are rewarded.

Sect. 1. As to the firſt Point it ſeems clear, That [a] all Perſons whatſoever who are preſent when a Felony is committed, or a dangerous Wound given, are bound to apprehend the Offender, on Pain of being fined and impriſoned for their Neglect, [b] unleſs they were under Age at the Time.

Sect. 2. And for this [c] Cauſe, by the Common Law if any Homicide be committed, or dangerous Wound given, whether with or without Malice, or even by [d] Miſadventure or Self-defence, in any Town or in the [e] Lanes or Fields thereof, in the Day-time, and the Offender eſcape, the Town ſhall be amerced, and if out of a Town, the [f] Hundred ſhall be amerced.

Sect. 3. And ſince the Statute of *Wincheſter cap.* 5. which ordains that [g] walled Towns ſhall be kept ſhut from Sun-ſetting to Sun-riſing, if the Fact happen in any ſuch Town by Night or by Day, and the Offender eſcape, the Town ſhall be amerced.

[a] 3 Inſt. 53, 139, 152. H. P. C. 89, 90. 3 H. 7. cap. 1. 2 Inſt. 52. Fitz. Coron. 293.
[b] Firz. Coron. 395.
[c] H. P. C. 89, 90. 3 H. 7. cap. 1. 3 Inſt. 53. 4 Inſt. 183. Cro. Car. 252. 3 Leon. 207. Fitz. Coron. 238, 293, 299, 352, 425. Cont. 1 Leon. 107.
[d] 2 Inſt. 315. Fitz. Coron. 302.
[e] Dy. 210. pl. 25.
[f] S. P. C. 34. E. P.
[g] S. P. C. 34. a. 3 Inſt. 53. 7 Co. 6. b. 7. a.

Sect. 4. And as all [a] private Persons are bound to apprehend all those, who shall be guilty of any of the Crimes abovementioned in their View; so also are they with the utmost Diligence to pursue, and endeavour to take all those who shall be guilty thereof out of their View, upon a Hue and Cry levied against them.

[a] H. P. C. 90. 3 Inst. 117. 2 Inst. 172.

Sect. 5. [b] Hue and Cry is the Pursuit of an Offender from Town to Town till he be taken, which all who are present when a Felony is committed, or a dangerous Wound given, are by the Common Law as well as by Statute, bound to raise against the Offenders who escape, on Pain of Fine and Imprisonment: Also it [c] seems certain, That a Man may lawfully raise it against one who sets upon him in the Highway to rob him: Also it is enacted by the Statute of [d] *Winchester, cap.* 4. That Hue and Cry shall be levied upon any Stranger who shall not obey the Arrest of the Watch in the Night-time; and [e] 21 *E.* 1. which was made against Trespassers in Forests, Chases, Parks, and Warrens, seems to allow the levying thereof upon any such Offenders. But if a Man take upon him to [f] levy a Hue and Cry without sufficient Cause, he shall be punished as a Disturber of the Peace.

[b] 3 Inst. 116, 117. Dalt. Justice, Ch. 28. 109. 2 Inst. 172. Fitz. Coron. 395. Cro. El. 654. Crompt. 178, 179.
[c] 9 E. 4. 26. b.
[d] 13 Ed. 1.
[e] Keble's Statutes, fol. 59.
[f] 29 E. 3. 39. Fitz. Tresp. 252. Crompt. 179.

Sect. 6. In order rightly to raise a Hue and Cry, you ought to go to the Constable of the next Town, and declare the Fact, and [g] describe the Offender, and the Way he is gone; whereupon the Constable ought immediately, whether it be Night or Day, to raise his own Town, and make a Search for the Offender; and upon the not finding him, to send the like Notice with the utmost Expedition, by Horsemen as well as Footmen, to the Constables of all the neighbouring Towns, who ought in like Manner to search for the Offender, and also to give Notice to their neighbouring Constables, and they to the next, till the Offender be found.

21 H. 7. 28. a.
[g] 3 Inst. 116. Dalt. Justice cap. 28, 109. H. P. C. 91. Cromp. 178, 179.

Sect. 7. Also every [h] private Person is bound to assist an Officer demanding his Help for the taking of a Felon, or the suppressing an Affray, or apprehending the Affrayers, *&c.*

[h] Ch. 13. Sect. 3.

Arrests of Offenders by private Persons permitted by Law, are either,

1. By their own Authority, or
2. By a Warrant from a Justice of Peace.

Arrests of this Kind by their own Authority, are either,

1. In Respect of Treason or Felony, or
2. In Respect of inferior Offences.

Arrests of this Kind in Respect of Treason or Felony are either,

1. For the Suspicion of such Crimes already done, or supposed to have been done, or,
2. To prevent their being done.

As to such Arrests for such Suspicion, I shall endeavour to shew,

1. What are sufficient Causes of Suspicion.
2. By whom the Person arrested must be suspected.
3. Whether any such Cause will justify an Arrest, where no Treason or Felony at all hath been committed, *&c.*
4. In what Manner an Arrest for such Suspicion is to be justified in Pleading.

Sect.

Sect. 8. As to the first Particular, *viz.* What are sufficient Causes of Suspicion, I shall take Notice of some of the Principal of them, which are generally agreed to justify the Arrest of an innocent Person for Felony, as

Sect. 9. 1. The common [a] Fame of the Country: but it [b] seems, That it ought to appear upon Evidence, in an Action brought for such an Arrest, that such Fame had some probable Ground.

Sect. 10. 2. The [c] living a vagrant, idle, and disorderly Life, without having any visible Means to support it.

Sect. 11. 3. The being in [d] Company with one known to be an Offender, at the Time of the Offence; or [e] generally at other Times keeping Company with Persons of scandalous Reputations.

Sect. 12. 4. The being found in such Circumstances as induce a strong Presumption of Guilt; as [f] coming out of a House wherein Murder has been committed, with a bloody Knife in one's Hand; or being found in [g] Possession of any Part of Goods stolen, without being able to give a probable Account of coming honestly by them.

Sect. 13. 5. The behaving one's self in such Manner as betrays a Consciousness of Guilt; as [h] where a Man being charged with a Treason or Felony, says nothing to it, but seems tacitly by his Silence to own himself Guilty; or where a Man accused of any such Crime, upon hearing that a Warrant is taken out against him, doth abscond.

Sect. 14. 6. The being [i] pursued by an Hue and Cry.

Sect. 15. As to the second Particular, *viz.* By whom the Person must be suspected, upon such an Arrest for Suspicion; it seems to be [k] agreed, That the Law hath so tender a Regard to the Liberty and Reputation of every Person, that no Causes of Suspicion whatsoever, let the Number and Probability of them be never so great, will justify the Arrest of an innocent Man, by one who is not himself induced by them to suspect him to be guilty, whether he make such Arrest of his own Head, or in Obedience to the Commands of a private Person, or even of a [l] Constable.

Sect. 16. As to the third Particular, *viz.* Whether any such Cause of Suspicion will justify an Arrest where no Treason or Felony at all hath been committed, or dangerous Wound given: It is holden in some [m] Books, That none of the abovementioned Causes will in any Case justify the arresting a Man for the Suspicion of a Crime, where in Truth no such Crime hath been committed either by him or any other Person whatsoever. But howsoever this Rule may in general be true, it seems very hardly maintainable in the Case of the Arrest of an innocent Person upon a Hue and Cry levied against him, in such a Place where his Character is unknown, and with such other Circumstances, that the People of the Country have no Reason to presume it groundless; for in such Cases, it would be a great Inconvenience to discourage Persons from following a Hue and Cry, with that Vigour and Diligence, which the Law expects, and the Publick Good requires, by making them liable to an Action if it should in the Event prove to have been levied without sufficient Cause, which they cannot take Time to examine without delaying their Pursuit: And since the Person injured by such an ill-grounded Hue and Cry, has a good Action against him that raised it, there seems to be no Necessity, that he should also have a Remedy against another. And this Opinion seems to be the more plausible, for that among the [n] Books [o] cited to maintain the contrary, [p] that which alone doth directly affirm it, seems to go upon an Argument manifestly inconclusive; for it says, That an Hue and Cry is not a sufficient Authority to arrest a Man unless a Felony be done, because the Words of the

[a] 2 H. 7. 15. b. 16. 5 H. 7. 4. b. 5. a. 11 E. 4. 4. b. Dy. 236. p. 26. Bridg. 62. 7 E. 4. 20. a. H. P. C. 91. Keilw. 81. Poult. 13. a.

[b] 2 Inst. 52. Crom. 98, 99. S. P. C. 97. Bracton 143.

[c] 7 E. 4. 20. a. 17 E. 4. 5. b. H. P. C. 91. Poult. 13. b.

[d] 7 E. 4. 20. a. Keilw. 71. Poult. 13. a. H. P. C. 91.

[e] 2 Inst. 52. Crompt. 98.

[f] 11 E. 4. 4. b. 12 Co. 92.

[g] 7 E. 4. 20. a. Cro. E. 901. Cro. Jac. 190, 191. Poult. 136. H. P. C. 91. 12 Co. 92. Moor 600. pl. 828.

[h] Crom. 98, 99 Fitz. Cor. 24.

[i] 29 El. 871. 29 E. 3. 39. Fitz. Tresp. 252. 5 H. 7. 5. a. 21 H. 7. 28. a. H. P. C. 91.

[k] 10 H. 7. 17. b. 2 H. 7. 15. b. 16. a. 5 H. 7. 4. b. 5. a. 7 Ed. 4. 20. a. 20 E. 4. 6. b. 11 E. 4. 4 b. Cro. El. 871. H. P. C. 93. 12 Co. 92.

[l] 10 H. 7. 17. b. 2 H. 7. 15. b. 16. a. 17 E. 4. 5. a. b.

[m] 2 Inst. 173. Cro. Jac. 194. H. P. C. 91. 2 H. 7. 3. a. 27 H 8. 23. a. 8 E. 4. 3. b. 3 Inst. 118, b. Fitz. Tresp. 252. E. 3. 39. 2 Rol Abr. 559. D.

[n] 29 E. 3. 39. 11 E. 4. 4. b. 2 H. 7. 15.

[o] 2 Inst. 173.

[p] 5 H. 7. 5. a.

the Statute of *Westminster* 1. *cap.* 9. are, That all Men shall be ready upon Hue and Cry to arrest Felons; but where no Felony is done, there can be no Felon, *&c.* to which it may be replied, That this Argument, if it prove any Thing, proves that none but Felons can be arrested on a Hue and Cry, which seems to be manifestly false; for it is agreed by all the Books, That if a Felony be actually committed, an innocent Person on whom a Hue and Cry for it is levied, may lawfully be arrested: Also there seems to be no Doubt, but that he who barely attempts to rob a Man, or who dangerously wounds him, may safely be pursued and taken by a Hue and Cry, and yet there is no Pretence to call such a Person a Felon. Vide supra Sect. 4, 5.

Sect. 17. And if it be granted lawful to arrest a Man on a Hue and Cry where no Felony hath been committed; from the like Grounds it seems also to follow, That it is lawful to arrest a Man on the Warrant of a Justice of Peace, where no Felony hath been committed; but this Point shall be more fully considered in the next Chapter.

Sect. 18. As to the fourth Particular, *viz.* In what Manner an Arrest for such Suspicion is to be justified in Pleading; it seems to be certain, That whoever would justify the Arrest of an innocent Person, by Reason of any such Suspicion, must not only shew that he suspected the Party [a]himself, but must also set forth the [b] Cause which induced him to have such a Suspicion, that it may appear to the Court to have been a sufficient Ground for his Proceeding: Also it seems [c] certain, That regularly he ought expressly to shew, that the very same Crime for which he made the Arrest, was actually committed. But [d] if a Man have several Causes of such Suspicion, he is not bound to insist upon some one of them only, but may alledge them all; for that the Replication *De son tort demesne*, answers the whole. And [e] where a Man arrests another, who is actually guilty of the Crime for which he is arrested, it seems, That he needs not in justifying it, set forth any special Cause of his Suspicion, but may say in general, that the Party feloniously did such a Fact, for which he arrested him, *&c.*

[a] Vide supra Sect. 15.
[b] 2 Inst. 52. Finch 340.
[c] 17 E. 4. 5. a. b. 1 E. 4. 20. a. Bridgm. 62. 7 H. 4. 35. 8 E. 4. 3. b. 27 H. 8. 23. a. Cro. Jac. 194. Finch 340.
[d] 7 E. 4. 20. a. 17 E. 4. 5. a. b. Bridgm. 62. Finch 394. 4 H. 7. 1. b. 2. a.
[e] 10 E. 4. 17. b. Fitz. Fuax Imprisonm. 5.

Sect. 19. As to the arresting of Offenders by private Persons of their own Authority, permitted by Law for the Prevention of Treason or Felony only intended to be done; it [f] seems, that any one may lawfully lay hold on another, whom he shall see upon the Point of committing a Treason or Felony, or doing any Act which would manifestly endanger the Life of another, and may detain him so long till it may reasonably be presumed, that he hath changed his Purpose; and upon this Ground it [g] seemeth to be the better Opinion, That not only a Constable, but any private Person, who shall see another expose an Infant in the Street, and refuse to take it away, may lawfully apprehend and detain him, till he shall consent to take Care of it.

[f] 9 E. 26. b. *See* B. 1 Ch. 60. Sect. 23.
[g] Popham 12. 13. Owen 98. Moor 284.

Sect. 20. As to the Arrest of Offenders by private Persons of their own Authority, permitted by Law, for inferior Offences; it [h] seems clear, That regularly no private Person can of his own Authority arrest another for a bare Breach of the Peace after it is over; for if an Officer cannot justify such an Arrest, without a Warrant from a Magistrate, surely *a fortiori*, a private Person cannot: Yet it is holden by [i] some, That any private Person may lawfully arrest a suspicious Night-walker, and detain him till he make it appear, that he is a Person of good Reputation. Also it hath been [k] adjudged, That any one may lawfully apprehend a common notorious Cheat, going about the Country with false Dice, and being actually caught playing with them, in order to have him before a Justice of Peace; for the publick Good requires the utmost Discouragement

[h] *See* B. 1. Ch. Ch. 63. Sect. 13, 14, 17.
[i] Latch. 173. 4 H. 7. 18 b. Poph. 208. *Quære* 4 H. 7. 1. b. 2. a. 5 H. 7. 5. a. 2 Inst. 52.
[k] 1 Jon. 249. Cro. Ca. 234. 2 Rol. Abr. 546. C. 2.

of all such Persons, and the restraining of private Persons from arresting them without a Warrant from a Magistrate, would often give them an Opportunity of escaping: And from the Reason of this Case it seems to follow, That the Arrest of any other Offenders by private Persons, for Offences in like Manner scandalous and prejudicial to the Publick, may be justified.

Cromp 147. 14 H. 8. 16. a. *Sect.* 21. As to Arrests of such Offenders by private Persons, having a Warrant from a Justice of Peace permitted by Law, there is no Doubt but that where the Law authorizes Justices of Peace to direct their Warrants to such Persons, it doth implicitly authorize the Execution of them by them.

As to the third general Point of this Chapter, *viz.* In what Cases the Arrests of Offenders by private Persons are rewarded by Law, I shall give a short Account of the Statutes concerning this Matter, in Relation,

1. To Robbers in Highways.
2. To Counterfeiters and Clippers of the Coin.
3. To Shoplifters, and other Offenders of like Nature.
4. To Burglars and felonious Breakers of Houses.

Sect. 22. And first as to Robbers in Highways it is enacted by 4 & 5 *W. & M.* 8. *That whoever shall apprehend and take one or more Thief or Robber in any Highway or Road in* England *or* Wales, *and prosecute him or them till he or they be convicted of any Robbery, committed in or upon any Highway, Passage, Field, or open Place, shall receive from the Sheriff of the County where such Robbery and Conviction shall be, without paying any Fee for the same, for every such Offender so convicted* 40 l. *within one Month after such Conviction and Demand thereof made, by tendring a Certificate to the said Sheriff under the Hand or Hands of the Judge or Justices before whom such Felon or Felons shall be convicted; and in Case any Dispute shall arise, between the Persons so apprehending any the said Thieves and Robbers touching their Right to the said Reward, That then the said Judge or Justices so respectively certifying, shall by their said Certificate direct and appoint the said Reward to be paid in such Shares and Proportions as to them shall seem just and reasonable. And if any such Sheriff shall die or be removed before the Expiration of one Month after such Conviction and Demand made, That then the next Sheriff shall pay the same within one Month after Demand and Certificate brought as aforesaid: And the Sheriff making Default in paying the said Sum, shall forfeit double as much.*

Sect. 23. And it is farther enacted, *That if any Person shall be killed by any such Robber in endeavouring to apprehend, or making Pursuit after him, the Executors or Administrators,* &c. *of such Person, shall receive* 40 l. *from the Sheriff,* &c. *upon Certificate delivered under the Hands and Seals of the Judge or Justices of Assize for the County where the Fact was done, or the two next Justices of the Peace, of such Person being so killed, which Certificate the said Judge or Justices, upon sufficient Proof before them made, are immediately required to give without Fee or Reward.*

Sect. 24. And it is farther enacted, *That every Person who shall so take, apprehend, prosecute, or convict such Robber as aforesaid, shall have as a further Reward, the Horse, Furniture and Arms, Money and other Goods of such Robber, that shall be taken with him; any their Majesties Right or Title, Bodies Politick or Corporate, or the Right or Title thereunto of the Lord of any Manor or Franchise, or of him or them lending or letting the same to Hire to any such Robber notwithstanding: Provided, That this shall not be extended to take away the Right of any Person to such Horses, Furniture, and Arms, Money or other Goods, from whom the same were before feloniously taken.*

Sect. 25. Secondly, As to Counterfeiters and Clippers of the Coin, it is enacted by 6 & 7 *Gul.* 3. 17. *That whoever shall apprehend any Person who shall counterfeit any of the current Coin of this Realm, or for Lucre clip, wash, file, or otherwise diminish the same, or shall cause to be brought into the Kingdom any clipt, false, or counterfeit Coin, and prosecute such Person to Conviction, shall have from the Sheriff of the County where such Conviction shall be, forty Pounds upon the Judge's Certificate,* &c.

Sect. 26. Thirdly, As to Shoplifters, *&c.* it is enacted by 10 & 11 *W.* 3. 23. *That whosoever shall take and prosecute to Conviction, any Person who by Night or Day, shall in any Shop, Warehouse, Coach-house or Stable, privately and feloniously steal any Goods, Wares, or Merchandizes, of the Value of* 5 s. (*though such Shop,* &c. *were not broken, and though no Person were in such Shop,* &c.) *or shall assist, hire, or command any Person to commit such Offence, shall have a Certificate thereof* Gratis *from the Judge or Justices, expressing the Parish or Place where such Felony was committed; and if any Dispute shall happen about the Right to such Certificate, the Judge or Justices shall direct and appoint the said Certificate into so many Shares, to be divided among the Persons therein concerned, as to the said Judge,* &c. *shall seem reasonable, which Certificate (before any Benefit has been made of it) may be once assigned over, and no more, and the original Proprietor or Assignee shall by Virtue thereof, be discharged from all Parish and Ward Offices, within the Parish or Ward wherein the Felony was committed; and the said Certificate shall be enrolled by the Clerk of the Peace of the County, for the Fee of one Shilling: And in Case any Person happen to be slain by any such Felons by endeavouring to apprehend them, his Executors,* &c. *shall have the like Reward,* &c.

Sect. 27. Fourthly, As to Burglars and felonious Breakers of Houses, it is enacted by 5 *Annæ* 31. *That every Person who shall take any one guilty of Burglary, or the felonious breaking and entring any House in the Day-time, and prosecute them to Conviction, shall receive above the Reward given by the abovementioned Statute of* 10 & 11 W. 3. *the Sum of* 40 l. *within one Month after such Conviction*; concerning which the same Rules in Effect are prescribed, as are provided by the abovementioned Statute of 4 & 5 *W.* 3. 8. concerning the Reward of 40 *l.* to be paid to those who shall apprehend a Highway-man.

CHAP. XIII.

Of Arrests by publick Officers.

ARRESTS of Offenders by publick Officers, are either by Vertue of Process from some Court of Record, or without such Process.

Arrests of this Kind by Vertue of such Process, shall be considered hereafter in their proper Place.

Arrests by publick Officers without such Process, are either

1. By Watchmen.
2. By Constables.
3. By Bailiffs of Towns, or
4. By Justices of Peace.

Sect. 1.

Sect. 1. But before I consider the Nature of each of these in particular, I shall take it for granted, That where-ever any such Arrest may be justified by a private Person, in every such Case, *a fortiori* it may be justified by any such Officer. As to Arrests by Watchmen, I shall first premise in what Manner Watch is to be kept in every Town, and then shall shew the Power of the Watchmen.

Sect. 2. And first as to the keeping Watch in every Town, it is enacted by the Statute of *Winchester*, Ch. 4. *That from thenceforth all Towns be kept as it had been used in Times passed, That is to wit, from the Day of* Ascension *unto the Day of* St. Michael, *in every City six Men shall keep at every Gate, in every Borough twelve Men, in every Town six or four, according to the Number of Inhabitants of the Town, and shall watch the Town continually all Night, from the Sun-setting to the Sun-rising.*

Sect. 3. And it farther enacted by 5 *H.* 4. 3. *That the Watch to be made upon the Sea-Coasts through the Realm, shall be made by the Number of the People in the Places, and in Manner and Form as they were wont to be made in Times past, and that in the same Case the Statute of* Winchester *be observed and kept; and that in the Commissions of the Peace this Article be put in, That the Justices of Peace have Power thereof to make Inquiry in their Sessions from Time to Time, and to punish them which be found in Default after the Tenor of the said Statute.*

Sect. 4. It hath been resolved, That a Stranger who is not an Inhabitant of a Town, [a] cannot be compelled by Vertue of the said Statute of *Winchester* to keep Watch in it; but it seems to be agreed, That every Inhabitant is bound to keep it in his Turn, or to [b] find another sufficient Person to keep it for him; from whence it follows, That he is indictable for a Refusal: But it is [c] not agreed, That he may be committed by the Constable till he consent to do his Duty.

[a] Cro. El. 204.

[b] Vide Co. Lit. 70. a.

[c] Cro. El. 204.

Sect. 5. As to the Power of Watchmen, it is farther enacted by the said Statute of *Winchester*, Ch. 4. *That if any Stranger do pass by the Watch, he shall be arrested until Morning. And if no Suspicion be found, he shall go quit; and if they find Cause of Suspicion, they shall forthwith deliver him to the Sheriff, and the Sheriff may receive him without Damage, and shall keep him safely until he be acquitted in due Manner. And if they will not obey the Arrest, they shall levy Hue and Cry upon them, and such as keep the Town shall follow with Hue and Cry with all the Town and the Towns near, and so Hue and Cry shall be made from Town to Town, until that they be taken, and delivered to the Sheriff as before is said: And for the Arrestments of such Strangers none shall be punished.*

Poph 208. Latch. 173.

Sect. 6. It is holden, That this Statute was made in Affirmance of the Common Law, and that every private Person may by the Common Law arrest any suspicious Night-walker, and detain him till he give a good Account of himself, as hath been more fully shewn in the precedent Chapter, Section 20.

Secondly, As to such Arrests by Constables, I shall endeavour to shew,

1. How far they may be justified by their own Authority.
2. How far by Vertue of a Warrant from a Justice of Peace.

Sect. And first, As to the justifying of such Arrests by the Constable's own Authority; it seems difficult to find any Case, wherein a Constable is impowered to arrest a Man for a Felony committed or attempted, in which a private Person might not as well be justified in doing it: But the chief

chief Difference between the Power and Duty of a Constable and a private Person in Respect of such Arrests seems to be this, That the [a] former has the greater Authority to demand the Assistance of others, and is liable to the severer Fine for any Neglect of this Kind, and has no sure Way to discharge himself of the Arrest of any Person apprehended by him for Felony, [b] without bringing him before a Justice of Peace in order to be examined, as shall be more fully shewn in the 16th Chapter, whereas a private Person having made such an Arrest, needs only to deliver his Prisoner into the Hands of the Constable.

[a] 3 Inst. 158. Lamb. Constable 12. 17 E. 4. 5. a. b. 3 H. 7. 1. a. 2 H. 7. 15. b.
[b] H. P. C. 91, 112
10 E. 4. 17. b.

Sect. 8. But it is said, That a Constable hath Authority not only to arrest those whom he shall see actually engaged in an Affray, but also to detain them till they find Sureties of the Peace, as hath been more fully shewn in the [c] first Book; whereas a private Person seems to have no other Power in a bare Affray, not attended with the Danger of Life, but only to stay the [d] Affrayers till the Heat be over, and then deliver them to the Constable, and also to stop those whom he shall see coming to join either Party: But it is difficult to find any Instance wherein a Constable hath any greater Power than a private Person over a Breach of the Peace out of his View; and it seems clear, That he cannot justify an Arrest for any such Offence, without a Warrant from a Justice of Peace, *&c.*

[c] Ch. 63. Sect. 14, 17.
[d] B. 1. Ch 63. Sect. 11, 12.

Sect. 9. As to the justifying such Arrests by Constables, by Vertue of a Warrant from a Justice of Peace, it seems [e] clear, That such an Arrest unlawfully made by a Constable without a Warrant, cannot be made good by a Warrant taken out afterwards; also it hath been [f] holden, That if a Constable after he hath arrested the Party by Force of any such Warrant suffer him to go at large, upon his Promise to come again at such a Time and find Sureties, he cannot afterwards arrest him by Force of the same Warrant: However, if the Party return and put himself again under the Custody of the Constable, it seems, that it may be probably argued, That the Constable may lawfully detain him and bring him before the Justice in Pursuance of the Warrant; for if a Person taken by Vertue of a civil Process and voluntarily suffered by the Sheriff to escape, may afterwards upon his Return to the Prison be kept by the Sheriff by Vertue of the same Process, unless the Plaintiff rather chuse to take Advantage of the Escape against the Sheriff; surely *a fortiori* upon an Arrest for a Crime, in which Case it is to be presumed, that the Publick Good requires that the Party be brought to Justice, it shall likewise be lawful to detain a Person returning to the Officer after such an Escape: However as the Law seems [g] not to be settled in Relation to such an Escape after an Arrest by Vertue of civil Process; so neither doth it seem to be clear in Relation to an Escape after an Arrest by Force of such a Warrant from a Justice of Peace.

[e] Dy. 244, pl. 61. Fitz Bar. 248. Crompt. 149. a. 2 Keb. 705. Dalt. cap. 117. fol. 338.
[f] Cromp. 148. 2 Keb. 206. Dalt. cap. 117. 13 E. 4. 9. a.
[g] *See* 1 Danv. Abr. 633. pl. 4. 635. pl. 11. Hob. 202. 1 Lev. 21. Cro. Ca. 75. 2 Keb. 206.

Sect. 10. But it seems clear, That a Constable cannot justify any Arrest by [h] Force of a Warrant from a Justice of Peace, which expressly appears in the Face of it, to be for an Offence whereof a Justice of Peace hath no Jurisdiction, or to bring the [i] Party before him at a Place out of the County for which he is a Justice. But it seems, That he both may and ought to execute a general Warrant to bring a Person before a Justice of Peace, to answer such Matters as shall be objected against him on the Part of the King; for that the Officer ought to presume, That the Justice hath a Jurisdiction of the Matter, which he takes [k] Conusance of, unless the contrary appear; and it may often endanger the Escape of the Party to

[h] 14 H. 8. 16. Crompt. 147, 148.
[i] Crompt. 149. b.
[k] Dalt. cap. 117.

Dalt.cap.117. Crompt.147, 148. Cro. Jac. 81. H. P. C. 93. 3 Inst. 177. *Yet see a Precedent of this kind*, Dalt. 114. Dalt.cap.117. Crompt.147, 148. Dalt. Justice, cap. 118. 14 H 8. 16. *See* Ch. 12. Sect 15. Cont 4 Inst. 177. H. P. C. 93, 94.

make known the Crime he is accused of. But it seems to be very questionable, Whether a Constable can justify the Execution of a general Warrant to search for Felons or stoln Goods, because such Warrant seems to be illegal in the very Face of it; for that it would be extreamly hard to leave it to the Discretion of a common Officer to arrest what Persons, and search what Houses he thinks fit: And if a Justice cannot legally grant a blank Warrant for the Arrest of a single Person, leaving it to the Party to fill it up, surely he cannot grant such a general Warrant, which might have the Effect of a hundred blank Warrants.

Dong 346.

Sect. 11. Yet perhaps it is the better Opinion at this Day, That any Constable, or even private Person, to whom a Warrant shall be directed from a Justice of Peace to arrest a particular Person for Felony, or any other Misdemeanour within his Jurisdiction, may lawfully execute it, whether the Person mentioned in it be in Truth guilty or innocent, and whether he were before indicted of the same Offence or not, and whether any Felony were in Truth committed or not; for however the Justice himself may be punishable for granting such a Warrant without sufficient Grounds, it is reasonable that he alone be answerable for it, and not the Officer, who is not to examine or dispute the Reasonableness of his Proceeding; and therefore it seems that the old Books, (cited in the foregoing Chapter, Sect. 15, 16) which say generally, That no one can justify an Arrest upon a Suspicion of Felony, unless he himself suspect the Party, and unless the Felony were in Truth committed, ought to be intended only of Arrests made by a Person of his own Head, or in Obedience to the Command of a Constable, or other such like ministerial Officer, and not of such as are made in Pursuance of the Warrant of a Justice of Peace; for inasmuch as it seems to have been the constant and allowed Practice of late, to make out Warrants on the Suspicion of Felony, before any Indictment hath been found against the Person suspected; and the same seems to be countenanced by 1 & 2 *Ph. & Mar.* 13. and 2 & 3 *Ph. & Mar.* 10. which direct in what Manner Persons brought before Justices of Peace upon Suspicion, shall be examined in order to their being committed or bailed; and since the ancient [a] Opinion, That a Justice of Peace cannot make out a Warrant against a Man for Felony, who has not been indicted before, hath been [b] contradicted by constant Experience; and since in the very same [c] Report in which this Rule is laid down, That a Justice of Peace cannot make a Warrant against a Person who has not been indicted; it seems nevertheless to be agreed, That such a Warrant is a good Justification for the Officer; and since none of the [d] Books cited by Sir *Edward Coke* to maintain the contrary Opinion mention the Case of an Arrest by force of a Warrant from a Justice of Peace, but generally relate only to Arrests by private Persons of their own Authority, or by the Command of a Constable; and since too the [e] Case, which is fullest to the Purpose, wherein it is resolved, That an Arrest of a Person by the Command of a Bishop for saying, That he was not bound to pay Tithes, could not be justified by Force of the [f] Statute, which authorized Bishops to arrest Persons for Heresy, for which this Reason is given among others, That the Bishop himself could not justify such an Arrest, and consequently could not authorize another to make it; it may be answered, That the Resolution in that Case doth not wholly depend upon this Reason, but rather perhaps upon these, that the Bishop's Command was by Parol only, and not by Writing, and that the Statute gave him no Jurisdiction over Points not Heretical; and that the Power of imprisoning Persons

Dalt.cap.118, 121. 6 Mod. 179. Cro. E. 130. 1 Leon. 187.

[a] 4 Inst. 177. 14 H. 8. 16.
[b] 6 Mod. 179.
[c] 14 H. 8. 16. Bro. Faux Imprisonment 33.
[d] 2 H. 7. 3 pl. 9. 15. pl. 1. 4 H. 7. 2. a. 5 H. 7. 4. 5. 10 H. 7. 17. 20 H. 7. 12. 7 E. 4. 20. 8 E. 4. 3. b. 9 E. 4. 26. b. 10 E. 4. 17 b. 11 E. 4. 4. b. 13 E. 4. 9. a. 17 E. 4. 5. 7 E. 4. 35. Dyer 236.
[e] 10 H. 7. 17.
[f] 2 H. 4. ch. 15.

Persons for meer Matters of Opinion ought to be strictly construed: And farther, since the Party injured by an Arrest on a Justice's Warrant, hath a good Action against the Justice who granted it, if he did it maliciously of his own Head, in order to oppress or defame the Party, without any probable Ground of Suspicion; and therefore there is no Necessity of giving a farther Remedy against the Officer who obeys the Warrant: And farther, since it is in general a great Discouragement to Officers, to subject them to Actions for endeavouring to serve the Publick, by paying Obedience to the Precepts of those whose Officers they are; it would certainly be very difficult at this Day, to maintain an Action against them for any Arrest of this Kind, unless the Warrant appear to be for a Matter whereof the Justice has no Jurisdiction. It seems indeed to be holden in *Broucher*'s Case in *Croke*'s second Report, That where an Officer arrests a Man by Force of a Warrant from a Magistrate, *pro certis Causis*, without shewing any Cause in particular, he cannot justify himself in an Action brought against him for such Arrest, without setting forth the particular Cause in his Plea; and yet in this very Report it seems to be allowed, That such a general Warrant is good; and if so, it seems strange, That the Officer should not be justified by setting forth the Truth of his Case; since if there were no good Cause to justify the granting of the Warrant, the Magistrate ought to answer for it, not the Officer.

Cro. El. 130. 1 Leon. 187.

Cro. Jac. 81.

Sect. 12. Thirdly, As to such Arrests by Bailiffs of Towns, it is enacted by the abovementioned Statute of *Winchester*, Ch. 4. *That in great Towns being walled, the Gates shall be closed from the Sun-setting until the Sun-rising, and that no Man do lodge in the Suburbs, nor in any Place out of the Town, from nine of the Clock until Day, without his Host will answer for him: And the Bailiffs of Towns every Week, or at the least every fifteenth Day, shall make Inquiry of all Persons being lodged in the Suburbs, or in foreign Places of the Towns; and if they do find any that have lodged or received any Strangers or suspicious Persons against the Peace, the Bailiffs shall do Right therein.* And surely it cannot be doubted, but that by Force hereof such Bailiffs may lawfully arrest and detain any such Stranger, being found under probable Circumstances of Suspicion, till he shall give a good Account of himself.

Sect. 13. Fourthly, As to such Arrests by Justices of Peace, I shall first take it for granted, That where-ever an Arrest of this Kind by a private Person, or inferior Officer acting of their own Authority, is either permitted or enjoined by the Law, in every such Case, *a fortiori*, such an Arrest by a Justice of Peace in Person, is also permitted or enjoined.

H. P. C. 93,

Arrests by the Command of Justices of Peace, as such, are either,

1. By Parol.
2. By Warrant.

Sect. 14. And first, As to such Arrests by Parol, it seems, That any such Justice may lawfully by Word of Mouth, authorize any one to arrest another, who shall be guilty of any actual Breach of the Peace in his Presence, or shall be engaged in a Riot in his Absence, as hath been more fully shewn in the first Book, Ch. 65. S. 16.

Dalt. cap 117.

As

As to such Arrests by the Warrant of a Justice of Peace, I shall endeavour to shew,

1. In what Cases a Warrant for such an Arrest may lawfully be made by such a Justice.
2. In what Form it ought to be made.
3. How it is to be executed.

As to the first Point, I shall consider,

1. For what Offences such a Warrant may be granted.
2. Upon what Evidence.

Sect. 15. And first as to the Offences for which such a Warrant may be granted, there seems to be no Doubt, but that it may be lawfully granted by any Justice of Peace for Treason, Felony or *Præmunire*, or any other Offence against the Peace, as hath been more fully shewn in the Chapter concerning *Justices of Peace*: Also it seems clear, That wherever a Statute gives to any one Justice of Peace a Jurisdiction over any Offence, or a Power to require any Person to do a certain Thing ordained by such Statute, it impliedly gives a Power to every such Justice to make out a Warrant to bring before him any Person accused of such Offence, or compellable to do the Thing ordained by such Statute; for it cannot but be intended, that a Statute giving a Person Jurisdiction over an Offence, doth mean also to give him the Power incident to all Courts, of compelling the Party to come before him. And it would be to little Purpose to authorize a Man to require another to do a Thing, if it were to be understood that the Person authorized had no Power to compel the Party to come before him.

Supra Ch. 8. Sect 33, 34.

Dalt. cap. 117. 12 Co. 130, 131.

Sect. 16. But it seems, That anciently no one Justice of Peace could legally make out a Warrant for an Offence against a Penal Statute, or other Misdemeanour, cognizable only by a Sessions of two or more Justices; for that one single Justice of Peace hath no Jurisdiction of such Offence, and regularly those only who have a Jurisdiction over a Cause can award Process concerning it. Yet the long, constant, universal, and uncontrolled Practice of Justices of Peace seems to have altered the Law in this particular, and to have given them an Authority in Relation to such Arrests, not now to be disputed.

Dalt. cap. 117. Bro. Peace 6.

6 Mod. 179.

Sect. 17. But I do not find any good Authority, That a Justice can justify sending a general Warrant to search all suspected Houses in general for stolen Goods, as hath been more fully shewn, *Sect.* 10.

H. P. C. 93. 4 Inst. 177. b.

Sect. 18. Secondly, As to the Evidence on which such a Warrant is to be granted, it seems probable, That the Practice of Justices of Peace in Relation to this Matter also, is now become a Law, and that any Justice of Peace may justify the granting of a Warrant for the Arrest of any Person upon strong Grounds of Suspicion for a Felony or other Misdemeanour, before any Indictment hath been found against him. Yet inasmuch as Justices of Peace claim this Power rather by Connivance, than any express Warrant of Law, and since the undue Execution of it may prove so highly prejudicial to the Reputation as well as the Liberty of the Party, a Justice of Peace cannot well be too tender in his Proceedings of this Kind, and seems to be punishable not only at the Suit of the King, but also of the Party grieved; if he grant any such Warrant groundlesly

6 Mod. 179. *Quære* Dalt. 117. Con. 14 H. 8. 16.

groundlesly and maliciously, without such a probable Cause, as might induce a candid and impartial Man to suspect the Party to be guilty. Cro. El. 130. 1 Leon. 187.

Sect. 19. And since both *Coke* and *Hale* seem to disapprove of such Warrants granted upon Suspicion, and the old Books seem generally to disallow all Arrests for the Suspicion of Felony made by any other Person whatsoever except the very Person who hath the Suspicion; it is certainly a safe Way of Proceeding for him, who hath the Suspicion to make the Arrest in his proper Person, and to get a Warrant from a Justice of Peace to the Constable to keep the Peace. 4 Inst. 177. H P C. 93. Supr Sect 10. Ch. 12. Sect. 15.

Sect. 20. And perhaps there may be this Difference between the Warrant of a Justice of Peace, for such Causes which he has not Authority to hear and determine as Judge without the Concurrence of others, and such Warrant for an Offence which he may so determine, without the Concurrence of any other: That in the former Case, inasmuch as he rather proceeds ministerially than judicially, if he act corruptly, he is liable to an Action at the Suit of the Party, as well as to an Information at the Suit of the King: But in the latter Case he is punishable only at the Suit of the King, for that regularly no Man is liable to an Action for what he doth as Judge. Cro. E. 130. 1 Leon. 187. 1 Danv. Abr. 179. pl. 1, 2, 6.

As to the second Point, *viz.* In what Form such a Warrant is to be made; I shall lay down the following Rules:

Sect. 21. 1. That [a] it ought to be under the Hand and Seal of the Justice who makes it out. [a] Dalt. cap. 117.

Sect. 22. 2. That it [b] ought to set forth the Year and Day wherein it is made, That in an Action brought upon an Arrest made by Vertue of it, it may appear to have been prior to such Arrest. 3 Inst. 76. 14 H. 8. 16. [b] Dalt. cap. 117.

Sect. 23. 3. That it is [c] safe, but perhaps not necessary, in the Body of the Warrant to shew the Place where it was made; yet it seems necessary to set forth the County in the Margin, at least if it be not set forth in the Body. *See the Precedents in* Dalt. cap. 121. [c] Dalt. cap. 117, 221. Lamb 85. 86. Crompt. 147. 232, &c.

Sect. 24. 4. That it may be made either in the Name of the King, or of the Justice himself, as appears from the Precedents above referred to.

Sect. 25. 5. [d] That if it be for the Peace or Good Behaviour, it is adviseable to set forth the special Cause upon which it is granted; but if it be for Treason or Felony, or other Offence of an enormous Nature, it is said, That it is not necessary to set it forth; and it seems to be rather discretionary, than necessary to set it forth in any Case. [d] Dalt. c. 117. Supra Sec. 10.

Sect. 26. 6. [a] That such a Warrant may be either general, to bring the Party before any Justice of Peace of the County, or special, to bring him before the Justice only who granted it. [a] Dalt. cap. 117. 1 Rol. Rep. 375.

Sect. 27. 7. [b] That it may be directed to the Sheriff, Bailiff, Constable, or to any indifferent Person by Name, who is no Officer; for that the Justice may authorize any one to be his Officer, whom he pleases to make such, yet it is most adviseable to direct it to the Constable of the Precinct wherein it is to be executed; [c] for that no other Constable, and *a fortiori* no private Person, is compellable to serve it. 5 Co. 59. b. Bro. Peace 9. [b] Dalt. cap. 117. Cromp. 147. 14 H. 8. 16. Bro. Peace 6. Salk. 176. [c] Salk. 176.

As to the third Point, *viz*, In what Manner such Warrant is to be executed, I shall lay down the following Rules,

Sect. 28. 1. That a Bailiff or a Constable, if they be sworn and commonly known to be Officers, and act within their own Precincts, need

[8] E. 4. 14. a. [14] H. 7. 9. b. [6] Co. 54. [9] Co. 69. need not ſhew their Warrant to the Party, notwithſtanding he demand the Sight of it, but that theſe and all other Perſons whatſoever making an Arreſt, ought to acquaint the Party with the Subſtance of their Warrants, and that all private Perſons to whom ſuch Warrants ſhall be directed, and even Officers if they be not ſworn and commonly known; and even theſe, if they act out of their own Precincts muſt ſhew their Warrants, if demanded.

Dalt. cap. 117. 8 E. 4. 14. a. *Sect.* 29. 2. That the Sheriff having ſuch Warrant directed to him, may authorize others to execute it; but that every other Perſon to whom it is directed, muſt perſonally execute it; yet it ſeems, That any one may lawfully aſſiſt him.

Salk. 176. *Sect.* 30. 3. That if a Warrant be generally directed to all Conſtables, no one can execute it out of his own Precinct; but if it be directed to a particular Conſtable by Name, he may execute it any where within the Juriſdiction of the Juſtice.

CHAP. XIV.

Where Doors may be broken open in Order to make an Arreſt.

Sect. 1. AND now I am to conſider in what Caſes it is lawful to break open Doors in order to apprehend Offenders; and to this Purpoſe I ſhall premiſe, That the Law doth never allow of ſuch *Extremities but in Caſes of Neceſſity; and therefore, That no one can juſtify the breaking open another's Doors to make an Arreſt, unleſs he firſt ſignify to thoſe in the Houſe the Cauſe of his coming, and requeſt them to give him Admittance.

[*] 27 Aſſ. 35. 4 Inſt. 177. 5 Co. 91, 92. Dalt. cap. 78. H. P. C. 90. Fitz. Execution 252.

Sect. 2. But where a Perſon authorized to arreſt another who is ſheltered in a Houſe, is denied quietly to enter into it, in order to take him; it ſeems generally to be agreed, That he may juſtify breaking open the Doors in the following Inſtances.

[a] 27 Aſſ. 35. 12 Co. 131. 4 Inſt. 131. [b] Moor 606, 668. [c] Dalt. cap. 78. Cromp. 170. b *Sect.* 3. 1. Upon a [a] *Capias* grounded on an Indictment for any Crime whatſoever, or upon a [b] *Capias* from the [c] King's Bench or Chancery, to compell a Man to find Sureties for the Peace or Good Behaviour, or even upon a Warrant from a Juſtice of Peace for ſuch Purpoſe.

[d] Moor 606, 668. Cro. El. 908. Yelv. 28. Dalt. cap. 78. [e] 2 Jones 233, 234. *Sect.* 4. 2. Upon a [d] *Capias utlagatum*, or *Capias pro fine*, in any Action whatſoever.

Sect. 5. 3. Upon the [e] Warrant of a Juſtice of Peace, for the levying of a Forfeiture in Execution of a Judgment or Conviction for it grounded on any Statute which gives the whole, or but Part of ſuch Forfeiture to the King, and authorizes the Juſtice of the Peace to give ſuch Judgment or Conviction for it.

[f] Dalt. cap. 22 & 78. *Sect.* 6. 4. Where a [f] Forcible Entry or Detainer is either found by Inquiſition before Juſtices of Peace, or appears upon their View.

[g] H. P. C. 90, 93. Dalt. cap 78. 13 E 4 9. a. [h] 13 E. 3. 7. b. *Sect.* 7. 5. [g] Where one known to have committed a Treaſon or Felony, or [h] to have given another a dangerous Wound, is purſued either with or without a Warrant, by a Conſtable or private Perſon: But where one lies under a probable Suſpicion only, and is not indicted, it ſeems the better

better [a] Opinion at this Day, That no one can justify the breaking open Doors in Order to apprehend him.

[a] H P. C. 91. 4 Inst. 117. Con. 13 E. 9 a. B. o. Coron. 159. Dalt. cap. 78. Fitz Bar. 110.

Sect. 8. 6. Where an [b] Affray is made in an House in the View or Hearing of a Constable; or where those who have made an Affray in his Presence fly to a House, and are immediately pursued by him, and he is not suffered to enter; in order to suppress the Affray in the first Case, or to apprehend the Affrayers in either Case.

[b] H. P. C. 134, 135. Cromp. 170. b

Sect. 9. 7. Where-ever a [c] Person is lawfully arrested for any Cause and afterwards escapes, and shelters himself in a House.

Dalt. cap. 78. Bro. Faux Imprisoment 6

Sect. 10. Also it is enacted by 3 & 4 *Jac.* 1. Par. 35. *That upon any lawful Writ, Warrant, or Process, awarded to any Sheriff or other Officer, for the taking of any Popish Recusant, standing excommunicated for such Recusancy, it shall be lawful, if need be, to break open any House.*

[c] 6 Mod. 173, 174.

Sect. 11. But it hath been resolved, That where Justices of Peace are by Vertue of a Statute, authorized to require Persons to come before them, to take certain Oaths prescribed by such Statute, the Officer cannot lawfully break open the Doors of the Persons who shall be named in any Warrant made in Pursuance of such Statute, in order to be brought before the Justices to take such Oath, because such Warrant is not grounded on a precedent Offence; neither doth it appear, That the Party either is or will be guilty of any: But it seems clear, That if an Officer enter into any House to serve any such Warrant, and the Doors of the House be locked upon him, being in such House, he or his Friends may justify breaking them open, in order to regain his Liberty; for that even in the Execution of Civil Process, the Law allows of the breaking open Doors in the like Circumstances.

Palm. 52, 53. Cro. Jac. 555.

CHAP. XV.

Of Bail.

Sect. 1. AND now I am to consider in what Manner, and in what Cases Offenders are to be bailed; as to which it is to be observed, That where-ever a Person is brought before a Justice of Peace upon an Accusation of Treason or Felony, he must be either bailed or committed, unless it manifestly appear that no such Crime was committed, or that the Cause for which alone the Party was suspected, was totally groundless; in which Cases only it is lawful to discharge him without Bail.

H. P. C. 98. Crompt. 154.

For the better understanding of the Nature of Bail, I shall consider the following Points:

1. The Nature of Bail and Mainprize in general.
2. What shall be said to be sufficient Bail.
3. The Offence of taking insufficient Bail.
4. The Offence of granting it where it ought to be denied.

5. The

5. The Offence of denying, delaying or obſtructing it where it ought to be granted.
6. In what Caſes it is grantable.
7. In what Form it is to be taken.
8. What ſhall forfeit the Recognizance.

And firſt, As to the Nature of Bail and Mainpriſe in general, I ſhall endeavour to ſhew,

1. In what Reſpects they agree.
2. In what they differ.

Sect. 2. As to the firſt Particular it ſeems, That the Words Bail and Mainpriſe, are often uſed promiſcuouſly in our [a] Law-Books and [b] Acts of Parliament, as ſignifying one and the ſame Thing; and it is [c] certain, That Bail and Mainpriſe agree in this Notions that they ſave a Man from Impriſonment in the common Gaol, by his Friends undertaking for him before certain Perſons for that Purpoſe authorized, that he ſhall appear at a certain Day, and anſwer the Crime with which he is charged, and be juſtified by the Law.

Sect. 3. As to the ſecond Particular, The chief, if not the [d] only, Difference between Bail and Mainpriſe ſeems to be this, That a Man's Mainpernors are [e] barely his Sureties, and cannot juſtify the detaining or impriſoning of him themſelves, in order to ſecure his Appearance: But that a Man's Bail are looked upon as his [f] Gaolers of his own chooſing; and that the [g] Perſon bailed is in the Eye of the Law for many Purpoſes, eſteemed to be as much in the Priſon of the Court by which he is bailed, as if he were in the actual Cuſtody of the proper Gaoler. But I do not find this Point clearly ſettled in Relation to any other Court beſides the King's Bench, as hath been more fully ſhewn *Ch.* 6. *Sect.* 4. However it ſeems certain in every Bailment, That if the Party bailed be [h] ſuſpected by his Bail as likely to deceive them, he may be detained by them, and enforced to appear according to the Condition of the Recognizance, or may be [i] brought by them before a Juſtice of Peace, by whom he ſhall be committed, unleſs he find new Sureties.

Sect. 4. As to the ſecond Point, *viz.* What ſhall be ſaid to be ſufficient Bail, it ſeems to be [k] agreed, That no Perſon ought in any Caſe to be bailed for Felony by leſs than two; and it is [l] ſaid to be the Practice of the King's Bench, not to admit any Perſon to bail upon a *Habeas Corpus* on a Commitment for Treaſon or Felony without four Sureties: Alſo [m] it ſeems to have been anciently an eſtabliſhed Rule, That none under the Degree of Subſidy-men, ſhould be admitted to bail any Perſon for a capital Crime: But the Manner of granting Taxes by Way of Subſidy having been of late for many Years diſuſed, this Rule at preſent ſeems to be of little Uſe: But the only ſure Way of proceeding in this Caſe, is to take Care that every one of the Bail be of Ability ſufficient to anſwer the Sum in which they are bound, which [n] ought never to be leſs than forty Pounds for a capital Crime, but may be as much higher as the Juſtices in Diſcretion ſhall think fit to require, upon Conſideration of the Ability and Quality of the Priſoner, and the Nature of the Offence: And if it ſhall ſeem doubtful, whether the Perſons who offer themſelves to be Sureties, be able to anſwer ſuch Sum; it is [o] ſaid, That the Perſon who is to take the Bail, may examine them on their Oaths concerning their Sufficiency: And if a Perſon who has Power to take Bail be ſo far impoſed

[a] Dalt. cap. 114. Lamb. 340. 4 Inſt. 180.
[b] 1 Rich. 3 3. 3 H. 7. 3. 1 & 2 Ph. & Ma. 13.
[c] H P. C. 96. Dalt. cap 114.
[d] 4 Inſt. 179, 180.
[e] Fitz. Mainpriſe 12, 13. Bro Mainpriſe 89. Coke Bail & Mainprize, Ch. 3. *and the Books cited under Letter* f. g. h.
Cont. 4 H. 6. 8. pl. 21. 32 H. 6. 4. pl. 3.
[f] H. P. C. 98. Fitz. Mainpriſe 12, 13.
[g] S P.C. 64 D. 21 H 7. 33 pl. 26. 22 H. 6. 59. pl. 13. 39 H. 6. 27. pl. 39. 32 H. 6. 4. pl. 3. Supra Ch. 6. Sect. 4.
[h] Fitz. Mainpriſe 12, 13 Dalt. cap. 114. Brook Mainpriſe 99.
[i] H. P. C. 96. Dalt. cap. 114.
[k] H. P. C. 97. Dalt cap. 114. *See* 10 Co 101.
[l] Style's Practical Regiſter 110.
[m] Dalt cap. 70. & 114. H. P. C. 97.
[n] Dalt. cap. 114. H. P. C. 97.
[o] Dalt. cap. 114. Cromp. 194.

poſed upon as to ſuffer a Priſoner to be bailed by inſufficient Perſons, it is ſaid, That either he, or any other Perſon who hath Power to bail him, may require the Party to find better Sureties, and to enter into a new Recognizance with them, and may commit him on his Refuſal, for that inſufficient Sureties are as no Sureties. H. P. C. 96. Dalt. cap. 70. & 114.

Sect. 5. But Juſtices muſt take Care, That under pretence of demanding ſufficient Surety, they do not make ſo exceſſive a Demand, as in effect amounts to a Denial of Bail; for this is looked on as a great Grievance, and is complained of as ſuch by 1 *W. & M. Seſſ.* 2. by which it is declared, *That Exceſſive Bail ought not to be required.*

Sect. 6. As to the third Point, *viz.* the Offence of taking inſufficient Bail, it ſeems clear; That wherever a Sheriff, in purſuance of the Statute of *Weſtminſter, cap.* 15. Or Juſtices of Peace in purſuance of the ſubſequent Statutes, grounded on the ſaid Statute of *Weſtminſter* 1. and ſet forth more at large in the following part of this Chapter, ſhall admit any Perſon to bail for Felony, with inſufficient Sureties, who ſhall not afterwards appear according to the Condition of the Recogniſance, the Juſtices of Aſſiſe may, by force of 27 *Ed.* 1. *chap.* 3. commonly called the Statute *de finibus levatis*, impoſe ſuch Fine on ſuch Sheriff or Juſtices of Peace, as to ſuch Juſtices of Aſſiſe in their Diſcretion ſhall ſeem proper. But if a Priſoner, who is bailed by inſufficient Sureties, do appear according to the Condition of the Recogniſance, it ſeems that thoſe who admitted him to bail are ſafe, inaſmuch as the End of the Law is anſwered, and the Appearance of the Priſoner as effectually procured by ſuch Sureties, as if they had been never ſo ſufficient. Vide Supra. cap. 6. Sect. 10, 11, &c. Dalt. cap. 114. H. P. C. 97. Dalt. cap. 114. H. P. C. 97.

Sect. 7. As to the fourth point, *viz.* The Offence of granting Bail where it ought to be denied: There is no doubt but that the bailing of a Perſon who is not baileable by Law, is puniſhable either at Common Law, as a negligent Eſcape, as ſhall be more fully ſhewn in the Chapter concerning Eſcapes, or as an Offence againſt the ſeveral Statutes concerning Bail. S. P. C. 33. F. 77. A. 25 E. 3. 39. Pl. 22. Fitz. Eſchape 4 Coron. 246. H. P. C. 97, 113.

Sect. 8. And firſt it is enacted by the Statute of *Weſtminſter* 1. 15. *That if the Sheriff, or any other, let any go at large by Surety, that is not repleviſable, if he be Sheriff, or Conſtable, or any other Bailiff of Fee, which hath keeping of Priſons, and be thereof attainted, he ſhall loſe his Fee and Office for ever. And if the Under-Sheriff, Conſtable, or Bailiff of ſuch as have Fee for keeping of Priſons, do it contrary to the Will of his Lord, or any other Bailiff being not of Fee, they ſhall have three Years Impriſonment, and make Fine at the King's Pleaſure.*

Sect. 9. Alſo it is enacted by 27 *Ed.* 1. commonly called the Statute *de finibus levatis, cap.* 3. *That the Juſtices aſſigned to take Aſſiſes*, &c. *when they deliver the Gaols*, &c. *ſhall inquire if Sheriffs, or any other, have let out by Replevin Priſoners not repleviſable, or have offended in any Thing contrary to the Form of the ſaid Statute of* Weſtminſter 1. *and whom they ſhall find Guilty they ſhall chaſten and puniſh in all things, according to the Form of the ſaid Statute.* Vide Supra. Chap. 6. Sect. 10, 11, &c.

Sect. 10. And it is farther enacted by 4 *Ed.* 3. 2. *That at the time of the Aſſignment of Keepers of the Peace, mention ſhall be made, that ſuch as ſhall be indicted, or taken by them, ſhall not be let to Mainprize by the Sheriffs, nor by none other Miniſters, if they be not mainpernable by Law; nor that none who are indicted ſhall be delivered but by the Common Law. And that the Juſtices aſſigned to deliver the Gaols, ſhall have Power to inquire of Sheriffs, Gaolers, and others, in whoſe Ward ſuch Perſons indicted ſhall be, if they make Deli-* Vide Supra. Cap. 6. Sect. 12, 13.

verance, or let to Mainprise, any so indicted, which be not mainpernable; and to punish the said Sheriffs, Gaolers, and others, if they do any thing against the said Act.

Sect. 11. And it is enacted by 1 & 2 *Ph. & Mar.* 13. *That no Justice or Justices of Peace, shall let to Bail or Mainprise any Person or Persons, which, for any Offence or Offences, by them, or any of them committed, be declared not to be repleviſed or bailed, or be forbidden to be repleviſed or bailed, by the abovementioned Statute of* Westminster *the* first, cap 15. *And that the Justices of Gaol-Delivery of the Place where such Justices of the Peace shall be guilty of such Offence, upon due Proof thereof, by Examination before them, shall for every such Offence set such Fine on every such Justice, as the same Justices of Gaol-Delivery shall think meet,* &c.

Sect. 12. It hath been resolved, That it is no Excuse for Justices of Peace admitting a Person to bail, who was in Truth committed for a Cause not bailable by Law, that they did not know that he was committed for such Cause; and that no other Cause of his Commitment was mentioned in his *Mittimus* but the Suspicion of Felony; for that they ought, at their Peril, to have informed themselves of the Cause for which the Party was committed, that they might be satisfied that he was bailable by Law.

Poph. 96. Dalt.cap.114.

Sect. 13. As to the fifth Point, *viz.* The Offence of denying, delaying, or obstructing Bail where it ought to be granted; this seems to be a Misdemeanour, not only by the Statute, but also by the Common Law, and punishable thereby as an Offence against the Liberty of the Subject, not only by Action at the Suit of the Party wrongfully imprisoned, but also by indictment at the Suit of the King.

Vide 14 H. 7. 7. Pl. 19. H. P. C. 97. Dalt.cap. 114

Sect. 14. But it seems clear, That he who has Power to bail another is not bound to demand of him to find his Sureties, and to forbear committing him 'till he shall refuse to find them; but may well justify his Commitment, unless the Party himself shall offer his Sureties.

H. P. C. 97. Dalt.cap. 114 14 H. 7. 10. a. Bro. Peace, 7. Mainprise, 39.

Sect. 15. The principal Statutes relating to this Offence, are the abovementioned Statute of *Westminster* 1. 15. and the Statute *de finibus, cap.* 3. and 31 *Car.* 2. *cap.* 2. commonly called the *Habeas Corpus* Act: By the first whereof it is enacted, *That if any withhold Prisoners repleviſable, after that they have offered sufficient Surety, he shall pay a grievous Amerciament to the King. And if he take any Reward for the Deliverance of such, he shall pay double to the Prisoner, and also shall be in the great Mercy of the King.* And by the later of the said Statutes it is enacted, *That Justices of Assise shall inquire if Sheriffs, or any other, have offended in any thing contrary to the said Statute of* Westminster, *and whom they shall find Guilty they shall punish in all things according to the Form of the said Statute.*

Sect. 16. Also it is recited by the above mentioned Statute of 31 *Car.* 2. *That great Delays had been used by Sheriffs, Gaolers, and other Officers, to whose Custody the King's Subjects had been committed for criminal, or supposed criminal Matters; in making Return of Writs of* Habeas Corpus, *by standing out an* Alias *and* Pluries, *and sometimes more, and by other Shifts to avoid their yielding Obedience to such Writs, contrary to their Duty, and the known Laws of the Land, whereby many Subjects had been long detained in Prison, in such Cases where by Law they were bailable,* &c. And thereupon it is enacted, *That whensoever any Person shall bring any* Habeas Corpus *directed unto any Person whatsoever, for any Person in his Custody, and the said Writ shall be served upon the said Officer, or left at the Gaol or Prison with any of the Under-Officers, Under-Keepers, or Deputy of the said Officers or Keepers, that the said Officer or Officers, his or their Under-Officers, Under-Keepers, or Deputies, shall, within three Days after*

after such Service thereof (unless the Commitment were for Treason or Felony plainly and specially expressed in the Warrant of Commitment) upon Payment or Tender of the Charges of bringing the said Prisoner, to be ascertained by the Judge or Court that awarded the same, and endorsed on the said Writ, not exceeding 12 d. *per Mile, and on Security given by his own Bond, to pay the Charges of carrying back the Prisoner if he should be remanded, and that he will not make any Escape by the Way, make Return of such Writ, and bring, or cause to be brought, the Body of the Party so committed, or restrained, unto or before the Lord Chancellor, or Lord Keeper, or the Judges or Barons of the Court from which the said Writ shall issue, or such other Persons before whom the said Writ is made returnable, according to the Command thereof; and shall then likewise certify the true Causes of his Detainer or Imprisonment, unless the Commitment be in a Place beyond twenty Miles distance, &c. and if beyond the distance of twenty, and not above one hundred Miles, then within the Space of ten Days, and if beyond the Distance of one hundred Miles, then within the Space of twenty Days.*

Sect. 17. And it is further enacted, Par. 3. *That all such Writs shall be marked in this Manner,* Per Statutum tricesimo primo Caroli Secundi Regis; *and shall be signed by the Person that awards the same. And if any Person shall be, or stand committed or detained as aforesaid, for any Crime, unless for Treason or Felony, plainly expressed in the Warrant of Commitment, in the Vacation-time, it shall be lawful for such Person so committed or detained (other than Persons Convict, or in Execution by legal Process) or any one on his Behalf, to complain to the Lord Chancellor, or Lord Keeper, or any Justice of either Bench, or Baron of the Exchequer of the Degree of the Coif; and the said Lord Chancellor, &c. Justice or Baron, on view of the Copy of the Warrant of the Commitment, or otherwise on Oath that it was denied, are authorized and required, on Request in writing by such Person, or any in his Behalf, attested and subscribed by two Witnesses, who were present at the Delivery of the same, to grant an* Habeas Corpus *under the Seal of the Court whereof he shall be one of the Judges, to be directed to the Officer in whose Custody the Party shall be, returnable* immediate *before the said Lord Chancellor, &c. Justice or Baron; and on Service thereof as aforesaid, the Officer, &c. in whose Custody the Party is, shall within the times respectively before limited, bring him before the said Lord Chancellor, Justice or Baron before whom the said Writ is returnable; and in Case of his absence, before any other of them, with the Return of such Writ, and the true Causes of the Commitment and Detainer. And thereupon, within two Days after the Party shall be brought before them, the said Lord Chancellor, Justice or Baron, before whom the Prisoner shall be brought as aforesaid, shall discharge the said Prisoner from his Imprisonment, taking his Recognizance, with one or more Sureties, in any Sum according to their Discretions, having Regard to the Quality of the Prisoner and Nature of the Offence, for his Appearance in the King's Bench the Term following, or in such other Court wherein the Offence is properly cognisable, as the Case shall require; and then shall certify the said Writ with the Return thereof, and the Recognisance, into such Court; unless it be made appear to the said Lord Chancellor, &c. that the Party so committed is detained upon a Legal Process, Order or Warrant, out of some Court that hath Jurisdiction of criminal Matters; or by some Warrant signed and sealed with the Hand and Seal of any of the said Justices or Barons, or some Justice or Justices of the Peace, for such Matters or Offences, for the which by Law the Prisoner is not bailable.*

Sect. 18. But it is provided, Par. 4. *That if any Person shall have willfully neglected by the space of two whole Terms after his Imprisonment, to pray a* Habeas Corpus *for his Enlargment, he shall not have a* Habeas Corpus *to be granted in Vacation-time, in Pursuance of this Act.*

Sect. 19. And it is farther enacted, Par. 5. *That if any Officer, &c shall neglect or refuse to make the Returns aforesaid, or to bring the Body of the Prisoner according to the Command of the said Writ, within the respective Times aforesaid, or shall not within six Hours after Demand deliver a true Copy of the Commitment, &c. he shall forfeit for the first Offence* 100 l. *for the second* 200 l. *and be made uncapable to hold his Office, &c.*

Sect. 20. And it is farther enacted, Par. 6. *That no Person who shall be set at large upon any* Habeas Corpus, *shall be again imprisoned for the same Offence by any Person whatsoever, other than by the legal Order and Process of such Court wherein he shall be bound by Recognisance to appear, or other Court having Jurisdiction of the Cause, on pain of* 500 l.

Sect. 21. And it is farther enacted, Par. 7. *That if any Person who shall be committed for Treason or Felony, plainly and specially expressed in the Warrant of Commitment; upon his Prayer or Petition in open Court the first Week of the Term, or the first Day of the Sessions of Oyer and Terminer, or general Gaol-Delivery, to be brought to his Trial, shall not be indicted some time in the next Term, Sessions of Oyer and Terminer, or general Gaol-Delivery after such Commitment, the Justices of the said Courts shall, upon Motion in open Court, the last Day of the Term, or Sessions, set at Liberty the Prisoner upon Bail; unless it appear upon Oath, that the Witnesses for the King could not be produced the same Term, &c. And if such Prisoner, upon his Prayer, &c. shall not be indicted and tried the second Term, or Sessions, he shall be discharged from his Imprisonment.*

Sect. 22. And it is farther enacted, Par. 10. *That it shall be lawful for any Prisoner, as aforesaid, to move and obtain his* Habeas Corpus *as well out of the Chancery or Exchequer, as the King's Bench or Common Pleas: And if the said Lord Chancellor or Lord Keeper, or any Judge or Judges, Baron or Barons for the time being, of the degree of the Coif, of any of the Courts aforesaid, in the Vacation-time, upon View of the Copy of a Warrant of Commitment or Detainer, or on Oath made that such Copy was denied, shall deny any Writ of* Habeas Corpus, *by this Act required to be granted, being moved for as aforesaid, they shall severally forfeit to the Party grieved, the Sum of* 500 l.

Sect. 23. But it is provided, Par. 18. *That after the Assises proclaimed for that County where the Prisoner is detained, no Person shall be removed from the common Gaol upon any* Habeas Corpus *granted in pursuance of this Act; but upon such* Habeas Corpus *shall be brought before the Judge of Assise in open Court, who thereupon shall do what to Justice shall appertain.* But it is provided nevertheless, Par. 19. *That after the Assises are ended, any Person detained may have his* Habeas Corpus *according to the Direction of this Act.*

Sect. 24. It is observable, that this Statute makes the Judges liable to an Action at the Suit of the Party grieved in one Case only, which is the refusing to award a *Habeas Corpus* in Vacation-time; and seems to leave it to their Discretion in all other Cases, to pursue its Directions in the same manner as they ought to execute all other Laws, without making them subject to the Action of the Party, or to any other express Penalty or Forfeiture: And this is most agreeable to the general Reason of the Law, which regularly will not suffer a Judge to be liable to an Action for what he does as Judge.

E. 1. ch. 72. S. 6. & E. 2. ch. 1. S. 17.

As to the fifth Point, *viz.* In what Cases Bail is grantable, I shall endeavour to shew,

1. Where it is grantable by a Sheriff.
2. Where by a Justice of Peace.
3. Where by Justices of Gaol-Delivery.
4. Where by the Courts of *Westminster* Hall.

A

As to the first Point, I shall first consider, where Bail is grantable by a Sheriff *ex officio*; and secondly, where by Virtue of a Writ.

Sect. 25. As to the first Particular, it is holden [a] by some, That by the Common Law the Sheriff might, by Vertue of his Office, as principal Conservator of the Peace, bail any Person arrested on Suspicion of Felony, or for any other Offence which is bailable.

Sect. 26. Also it hath been holden, [b] that a Constable had the like Power by the Common Law: And it may [c] probably be inferred from the Recitals of the Writs of Mainprize in the Register, That by the Common Law the Sheriff had Power to bail Persons indicted of Larceny [d] in a Court Leet, and also Persons indicted as [d] Accessories to a Felony, and Persons appealed by [e] Approvers, after the Death of the Approvers, *&c.* But it seems that the Sheriff [f] had no Power *ex officio*, to bail any Person indicted of any Crime before Justices of Peace. And it is certain, [g] That neither the Sheriff, nor Constable, could, in any of the Cases abovementioned, take Bail by Recognisance, but only by Obligation. And some [h] have holden, That the Statutes which impower Justices of Peace to admit Persons to bail, on an Accusation of Felony, and particularly prescribe in what Manner they shall do it, have taken away all Power of this kind from the Sheriff and Constable; yet others seem to be of another Opinion, because the said Statutes are wholly in the Affirmative.

Sect. 27. But it seems certain, [i] That by the Common Law, the Sheriff might bail any Person who was indicted before him at his Torn, for Felony, or any other Crime that is bailable; because he might both award Process, and also give Judgment against the Person so indicted: And it is a general [k] Rule, That whosoever is Judge of the Offence, may bail the Offender. But it is holden, [l] that at this Day the Sheriff has lost this Power, by reason of 1 *Ed.* 4. *cap.* 2. set forth more at large *cap.* 10. *sect.* 74. by which it is enacted, That the Sheriff shall not proceed on any such Indictment, but shall remove it to the next Sessions of the Peace.

[a] Dalison 11. See the Preamble of 13 Ed. 1. Cap. 15.
Register. 83. b. 269. S. P. C. 74. letter D. Fitz. coron. 297. contra 2 Inst. 190.
[b] Dalison. 11. Contra 2 Inst. 190.
[c] Register. 269. a.
[d] Register. 270.
[e] Register. 269. b.
[f] Register. 133. b. 270. b. 271. a. b.
[g] Supra. cap. 8. Sect. 4, 5. Dalison. 11.
[h] Dalison. 11.
[i] H. P. C. 106. 2 Inst. 190. Register. 269.
[k] Lamb. 342, 348. S. P. C. 74. Letter E. 2 Inst. 190.
[l] H. P. C. 106.

As to the second Particular, it seems, That Bail is grantable by a Sheriff by Vertue of the following Writs.

1. That of *Odio & Atia.*
2. That of Mainprize.
3. That of *Homine replegiando.*

Sect. 28. But having already, in *Book* 1. *Cap.* 29. *Sect.* 20 and 24. incidentally shewn the Nature of the first of these Writs, which seems to be in great Measure obsolete at this Day, I shall refer the Reader to what is there said concerning it.

Sect. 29. Secondly, Of the Writ of Mainprize little Notice is taken in the late Books; yet the Law relating to it seems to be still in Force in many Cases; and consequently in such Cases, those who are bailable, and have been refused the Benefit of Bail, may still by Vertue thereof be delivered out of Prison (upon their finding Sureties [m] to the Sheriff that they will appear and answer to the Crimes alledged against them, before the Justices in the Writ mentioned, *&c.*) as those [n] who are imprisoned for a slight Suspicion of Felony, or indicted of Larceny [o] before the Steward of a Leet, or of Trespass [p] before Justices of Peace, and many other [q] Persons, all which it will be needless to enumerate.

[m] Register. 269. 270.
[n] F. N. B. 250. b. Register. 269. a.
[o] F. N. B. 250. C. Register. 269. a.
[p] Inst. 290.
[q] F. N. B. 250. G. 251. C. Register. 133. b. 270. b. 271. b.
[q] F. N. B. 250. 251. Register. 269, &c.

[a] H. P. C. 104.
[b] 2 Inſt. 190.

Sect. 30. But as to that which is ſaid in general, both by Sir *Matthew Hale* [a] and Sir *Edward Coke*, [b] in relation to this Matter, from which it may ſeem to have been the Opinion of thoſe Authors, That no Writ of Mainprize is grantable at this Day; it may be anſwered, That this is to be underſtood

[c] F. N. B. 250. A. 4 Inſt. 182. Coke, Bail and Mainprize, cap. 10. Vide Supra. Cap. 10. S. 72, 74.

[c] only of the Writ of Mainprize, for Perſons indicted before the Sheriff in his Torn, in relation to whom he has no judicial Power at this Day, and conſequently no Power to bail them *ex officio*; from whence it follows, That the Writ of Mainprize for ſuch Perſons, being grounded on a Suggeſtion that the Sheriff had unjuſtly refuſed before to admit them to bail, cannot now be proper, becauſe he cannot be ſaid to have unjuſtly refuſed to do a thing which he had no Power to do. But this can be no manner of Reaſon why the Writ of Mainprize ſhould not be ſtill grantable in other Caſes.

F. N. B. 66, 67, 68. Regiſter, 78, 79.

Sect. 31. Thirdly, As to the Writ of *Homine replegiando*, there ſeems to be no doubt but that at the Common Law the Sheriff might deliver any Perſons out of Priſon by Vertue of this Writ, except in thoſe ſpecial Caſes mentioned in the Statute of *Weſtminſter* 1. *cap.* 15. which is ſet forth more at large in the next Section: And if he had returned, that the Plaintiff had been eloigned out of the County by the Defendant,

Regiſter, 79 a
F. N. B. 68. C.

he might afterward, by Vertue of a *Capias in Withernam* againſt ſuch Defendant, whether he were a Peer or Commoner, have taken and impriſoned him till the Plaintiff ſhould be replevied. But the Writ of *Homine replegiando* has been much diſuſed of late, in ſuch Caſes wherein Juſtices of Peace have been authoriſed to admit Perſons to bail; yet whether the

Vide Supra. Section. 26

Statutes which gave ſuch Authority to Juſtices of Peace, being wholly in the Affirmative, do take away the Sheriff's Power in the Caſes mentioned in thoſe Statutes, may deſerve to be conſidered. However there can

1 Syd. 210.

be no doubt but that in other Caſes the Writ of *Homine replegiando*, and *Capias in Withernam*, are very proper and effectual Remedies.

Sect. 32. But for the better underſtanding the Sheriff's Power in this Particular, I ſhall ſet down, and endeavour to explain ſo much of the ſaid Statute of *Weſtminſter* 1. *cap.* 15. as relates to it, which is enacted as followeth, *Foraſmuch as Sheriffs, and others who have taken and kept in Priſon Perſons detected of Felony, and incontinent have let out by Replevin ſuch as were not repleviſable, and have kept in Priſon ſuch as were repleviſable, becauſe they would gain of the one Party, and grieve the other: And foraſmuch as before this time it was not determined which Perſons were repleviſable, and which not; but only thoſe that were taken for the Death of a Man, or by Commandment of the King, or of the Juſtices, or for the Foreſt: It is provided, and by the King Commanded, that ſuch Priſoners as before were outlawed, and they which have abjured the Realm, Provors, and ſuch as be taken with the Manner, and thoſe which have broken the King's Priſon, Thieves openly defamed and known, and ſuch as be appealed by Provors, ſo long as the Provors be living (if they be not of good Name) and ſuch as be taken for Houſe burning feloniouſly done, or for falſe Money, or for Counterfeiting the King's Seal, or Perſons excommunicate, taken at the Requeſt of the Biſhop, or for manifeſt Offences, or for Treaſon touching the King himſelf, ſhall be in no wiſe repleviſable by the common Writ, nor without Writ: But ſuch as be indicted of Larceny by Enqueſts taken before Sheriffs, or Bailiffs by their Office, or of light Suſpicion, or for Petit Larceny, that amounteth not above the value of*

2 Inſt. 190.

Twelve Pence, if they were not accuſed of ſome other Larceny aforetime, or accuſed of Receipt of Thieves or Felons, or of Commandment, or Force, or of Aid in

2 Inſt. 190.

Felony done, or accuſed of ſome other Treſpaſs, for which one ought not to loſe Life or Member, and a Man approved by a Provor, after the Death of the Provor (if he

he be no common Thief, nor defamed) shall be henceforth let out by sufficient Surety, whereof the Sheriff will be answerable, and that without giving ought of their Goods.

For the better Exposition hereof, I shall distinctly consider,

1. That part of the Preamble which declares, what Persons had always been agreed not to be repleviſable.
2. That part of the Purview which shews what other Persons shall not be repleviſable.
3. That which shews what Persons shall be repleviſable.

Of those who by the Preamble are declared to have always been agreed to be irrepleviſable, there are four kinds.

1. *Those who are taken for the Death of a Man.*
2. *Those who are taken by the Commandment of the King.*
3. *Those who are taken by the Commandment of the Justices.*
4 *Those who are taken for the Forest.*

Sect. 33. As to the first of these Particulars, it is obſervable that the Statute declares generally, That those imprisoned for the Death of a Man have always been taken to be irrepleviſable, without making any distinction between such Homicide as is malicious, and that which happens by Misadventure, or in Self-Defence. And it is further to be obſerved, that the Statute of *Gloceſter, cap.* 9. provides, *That where a Man kills another by Misfortune, or in his Defence, or in other Manner without Felony, he shall be put in Prison 'till the next coming of the Justices in Eyre, or Justices assigned to the Gaol-Delivery*, &c. And agreeably hereto we find, That all Persons in general, who are taken for the Death of a Man, are excepted out of the Writ [a] *de Homine replegiando:* And that even the Superior [b] Courts, which are not restrained by these Statutes, have yet been always cautious of bailing Persons imprisoned for any Homicide, except in such special Cases as shall be set forth more at large in the following part of this Chaprer.

2 Inſt. 186.

2 Inſt. 315.

[a] Regiſter, 77. b. F.N. B. 66.E.

[b] 25 Ed. 3. 42. pl. 27.

Sect. 34 Also it seems agreed, That Justices of Peace, who have Power at this Day to bail a Man arrested for a light Suspicion of Homicide, cannot Bail any such Person for Manslaughter, or even excusable Homicide, if it manifestly appear that he was guilty of the Fact, let it be never so plain that it cannot amount to Murder, as shall be shewn more at large in the following Part of this Chapter.

41 Aſſ. pl. 14. 37 Aſſ. pl. 12. 29 Aſſ. 44. 1 Ro. Re. 268. 44 Ed. 3. 38. pl. 34. 21 Ed. 4. 71. a.

Sect. 35. And it is enacted by 3 *H.* 7. 1. *That if it happen, that any Person named as Principal, or Accessary, be acquitted of any Murder at the King's Suit, within the Year and Day, that then the same Justices before whom he is acquitted, shall not suffer him to go at large, but either remit him to Prison, or bail him, after their Discretion, 'till the Year and Day be passed.*

Sect. 36. As to the second Particular, *viz.* That concerning those who are taken by the Commandment of the King, it seems, That the Words of the Statute concerning them are to be understood of such only as are imprisoned either by the King's Personal Command, or by the Command of his Privy Council, which is looked upon to be as it were incorporated with him, and to speak with his Mouth; and accordingly we find the exception in the Writ of *Homine replegiando*, relating to Persons imprisoned by the King, thus expressed in the Regiſter, *Niſi capti ſunt per ſpeciale preceptum noſtrum*; by which it seems to be implied, That this Exception is not

2 Inſt. 186, 187. S. P. C. 72. E. 1 Rol. Rep. 134. Dalt. cap. 114.

Regiſter, 77. b.

not to be applied generally to every Command whatsoever of the King: To which it may be added, That if it were to be understood in so large a Sense, it would extend even to those who are taken by a *Capias* in a Personal Action, for that every such *Capias* is the Commandment of the King; but it seems certain, That a Defendant taken by such a *Capias* is repleviſable by the Common Law. But Persons imprisoned by the special Command of the King, or of his Privy Council, are so far from being repleviſable by the Sheriff, that they have formerly [a] been adjudged not to be bailable even by the Court of King's Bench: However, at this Day the Law is otherwise declared and settled by Parliament, as shall be shewn more at large in the following part of this Chapter.

S. P. C. 72. E.

[a] 1. And 298. 1 Rol. Rep. 134, 192, pl. 31, 32. 219. 1 Leon. 70. Bro Mainprise, 37. Contra Moor 839.

Sect. 37. As to the third Particular, *viz.* That concerning Persons imprisoned by the Command of the Justices, it is observable, that the Exception in the Writ of *Homine replegiando*, in the Register, [b] concerning Persons so imprisoned, is restrained to those who are taken by the special Command of the King's Chief Justice. But by *Fitzherbert* [c] and *Staundford*, [d] *Cok.* [e] and *Dalton*, [f] the Words of the Statute relating to Persons so imprisoned, seem to be understood in a large Sense, of any of the King's Justices in general, as of those of Assise, as well as of those of the Courts of *Westminster* Hall. But it seems that they are not to be understood generally of Persons imprisoned by any Command whatsoever of such Justices, for that those who are imprisoned by their ordinary Command, not by way of Punishment, but in order only to be safely kept, are said to be repleviſable by the Sheriff, in Cases not prohibited by the Statute; and therefore it seems, That they must be taken in a more restrained Sense, of those only who are imprisoned by the absolute Command of such Justices by way of Punishment, as for a Misdemenour done in their Presence, or for other Contempts, or such like Matters, which lie rather in their Discretion than in their ordinary Power; and it seems that a Commitment by the Chief Justice, without shewing any Cause whatsoever, shall be intended to be for some such Matter; and there can be no doubt but that a Person under such a Commitment is irrepleviſable by the Sheriff. Also it hath been holden, That a Person so committed is not bailable upon a *Habeas Corpus:* But how far Persons committed by the absolute Command of one Court, are bailable by another, shall be more fully considered in the following Part of this Chapter.

[b] Register, 77. b.

[c] F. N. B. 66 E.

[d] S. P. C. 73.

[e] 2 Inst. 187.

[f] Dalt. cap. 114.

S. P. C. 73. Dalt. cap. 114. F. N. B. 251. B.

S. P. C. 73. Dalt. cap. 114. 24 Ed. 3. 33. pl. 25.

1 Rol. Rep. 131.

Sect. 38. As to the fourth Particular, *viz.* That concerning those who are imprisoned for the Forest, who also are excepted out of the Writ [a] of *Homine replegiando*; it seemeth that the said Exception is to be understood as well of Forests in the Hands of Subjects, [b] as of those in the Hands of the King; but it seems, that it is to be understood strictly of proper Forests only, and not to be extended [c] by Equity to Chases or Parks. And as to Imprisonments for Offences in Forests, the Law has been much mitigated by later Statutes; for it is recited by 1 *Ed.* 3. *cap.* 8. *That divers Persons had been undone by the chief Keepers of Forests*, &c. *against the Form of the Great Charter* [d] *of the Forest, and against the Declaration* [e] *made by King* Edward 1. *by which he granted, That Trespasses done, in his Forest, of Vert and Veniſon, should be presented at the next Swainmote, before the Foresters*, &c. *and that such Presentments made before such Foresters*, &c. *should by the Oaths of Knights, and other discreet and lawful Men*, &c. *by the common Assent of all the said Ministers, be solemnly written, and with their Seals enſealed: And that if any Indictment should be in any other Manner made, that the same should be void.* And thereupon it is ordained, *That from thenceforth no Man shall be taken nor imprisoned for Vert or Veniſon, unless he be taken with the Manner, or*

[a] Register, 77. b. 4 Inst. 314.

[b] Vide 1 Inst. 2. a. 233. a.

[c] Register, 80. b. F. N. B. 67. d. Vide Plowd. Com. 124. a.

[d] 9 H. 3. 10. & 16.

[e] 34 Ed. 1. commonly called, *Ordinatio Foreſtæ.*

or else indicted after the Form before specified: And then the chief Warden shall let him to mainprise 'till the Eyre of the Forest, without any thing taken for his Deliverance, And if the said Warden will not so do, he shall have a [c] *Writ out of the Chancery, &c. to be at Mainprise 'till the Eyre. And if the Warden shall not obey such Writ, the Plaintiff shall have a* [f] *Writ to the Sheriff to attach the said Warden before the King, at a certain Day, &c. And the Sheriff (the Verders being called to him) shall deliver him that is so taken, by good Mainprise, in the Presence of the Verders, and shall deliver the Names of the Mainpernors to the same Verders, to answer in the Eyre before the Justices, &c.* And it is farther enacted, by 7 *R.* 2. 4. That *No Man shall be imprisoned by any Officer of the Forest without due Indictment, or being taken with the Manner, or trespassing in the Forest, &c.*

[c] F. N. B. 67. A. Register, 80. b.
[f] F. N. B. 67. B. Register, 80. b.

Sect. 39. And *Note*, That Persons so indicted, or taken with the Manner, being imprison'd by such Officers, have their Election either to be mainprized by twelve Mainpernors, by Vertue of the Writ of *Homine replegiando*, given by the said Statute of 1 *Ed.* 3. 9. or to be bailed upon a *Habeas Corpus*, by the Judges of *Westminster* Hall, *&c.* And if a Person be imprisoned for any Offence relating to the Forest, without having been first indicted for it, or taken with the Manner, there seems to be no doubt but that he may have an Action of False Imprisonment, and may also be mainprised or bailed in the Manner abovementioned.

4 Inst. 290. Register, 80. b. F. N. B. 67. A. B. C. 45 Ed. 37 pl. 8. 4 Inst. 290. Register, 80. a. b.

And now I am to consider that part of the Purview of the above recited Statute of *Westminster*, 1. 15. which shews what other Persons are not repleviable, of which there are two Sorts.

1. Such as are excluded from the Benefit of a Replevin, in respect of the Notoriety of their Offence.
2. Such as are excluded from it in respect of the Hainousness of the Crime alledged against them.

Persons excluded from the Benefit of a Replevin, in respect of the Notoriety of their Offence, are of two kinds.

1. Those who by an express or implied Judgment, Sentence or Conviction, or their own Confession, appear to be Guilty.
2. Those who are under violent Presumptions of Guilt.

Sect. 40. And first, Of those who by Judgment, Sentence, Conviction or Confession, appear to be Guilty, some are excluded from the Benefit of a Replevin by the express Words of the Statute, as *Those who are outlawed, or have abjured the Realm*; *Persons excommunicate, taken at the request of the Bishop, and Provors.* And all other [a] Persons who are condemned, or convicted of Felony, or any other [b] heinous Crime whatsoever, whether by their own Confession, or by Verdict General or Special; [c] and also all those [d] who on their Examination own themselves guilty of a Felony alledged against them, and are charged in their *Mittimus* with the Felony so confessed, seem to be excluded from it by Parity of Reason, and the manifest Intent of the Statute; for [e] Bail is only proper where it stands indifferent whether the Party be Guilty or Innocent of the Accusation against him, as it often does before his Trial; but where that Indifferency is removed, it would, generally speaking, be absurd to bail him: And agreeably hereto the Statute of 2 *H.* 5. *cap.* 2. provides, even as to civil Causes, *That if upon a Writ of* Certiorari, *or* Corpus cum causa, *out of Chancery, it shall be returned that the Prisoner is condemned*

[a] S. P. L. 74. H. P. C. 101. Dalt. cap 114. 1 Rol. Rep. 268. 15 H. 7. 9. Pl 8. Kelynge 90. 3 Bulst. 113, 114.
[b] Vide in fra. S. 44.
[c] Dy. 179. pl. 42. 1 Bulst. 87, 88. 15 H. 7. 9. a.
[d] 3 Bulst. 114. 1 Rol. Rep. 268. 4 Inst. 178.
[e] 2 Inst. 188. Dyer 179. pl. 42. H. P. C. 100. 101.

condemned by judgment given againſt him, he ſhall be remanded, &c. Alſo 23 *H. 6. cap.* 10. which ordains, That Sheriffs, *&c.* ſhall let out of Priſon Perſons in their Cuſtody by force of any Writ, *&c.* in Perſonal Actions, or on Indictments of Treſpaſs, by ſufficient Sureties, *&c.* expreſly excepts *All ſuch as ſhall be in their Ward by Condemnation, Execution*, &c. And therefore it cannot but be reaſonable to intend, That the ſaid Statute of *Weſtminſter* 1. put the Caſes of Perſons outlawed and excommunicate as Examples only; meaning thereby to intimate, That all other Perſons under the like Circumſtances, ſhould be in like manner irrepleviſable: Yet it is certain, that the Court of King's Bench may, in their Diſcretion, in ſome ſpecial Caſes, bail a Perſon upon an Outlawry of Felony; as [a] where he pleads that he is not of the ſame Name, and therefore not the ſame Perſon with him that was outlawed; or alledges [b] any other Error in the Proceedings. Alſo it ſeems, That the Court of King's Bench, or Juſtices of Gaol-Delivery, may bail [c] a Perſon convicted of Manſlaughter, or, as ſome ſay, of any other Felony, for which he afterwards gets the King's Pardon. And [d] there ſeems to be no doubt at this Day, but that they may alſo bail any Perſon who is found guilty before them of Homicide in Self-defence, or by Miſadventure. Alſo it is certain, That if a Perſon appear to be impriſoned for an Excommunication, in a Cauſe of which the Spiritual Court hath no Conuſance, he may be delivered either upon a *Habeas Corpus*, or by quaſhing or ſuperſeding the Writ of *Excommunicato capiendo*.

See the Books above cited.

H P. C. 101. S. P. C. 74. Letter A. 2 Inſt. 188.

[a] 5 H. 7. 16. pl. 7.

[b] 19 H. 6. 2. a.

[c] Brook Mainprise. 94. H. P. C. 101. 105.

[d] H. P. C. 101. 105. F. N. B. 246. c. *Contra* Fitz. Coron. 297. 354. *Quære* S. P. L. 74. D.

Secondly, Of thoſe who are under violent Preſumptions of Guilt, and in that reſpect are excluded by the Statute from the Benefit of a Replevin, there are ſeveral kinds.

2 Inſt. 188.

Sect. 41. I. *Thoſe who are taken with the Manner* (or rather *Mainer*, that is, with the thing ſtolen, as it were, in their Hands) and by Parity of Reaſon, thoſe who are taken freſhly upon a Hue and Cry.

H. P. C. 101. H. P. C. 101.

Sect. 42. II. *Thoſe who have broken the King's Priſon*, and by the ſame reaſon thoſe who have broken any other Priſon, which the Law preſumes that no Innocent Perſon will do.

Vide cap. 18. S 1 & 4. 2 Inſt. 188.

Sect. 43. III. *Thoſe who are appealed by Provors*, who regularly are not bailable, becauſe the Approver, by confeſſing his own Guilt, induces a ſtrong Preſumption againſt thoſe whom he accuſes of the ſame Crime of which he owns himſelf guilty; yet by the expreſs Words of the Statute, *If the Perſon appealed by an Approver be of good Reputation, he may be bailed, even in the Life of the Approver; and, unleſs he be a notorious Felon, he may be bailed after his Death.* And by Parity of Reaſon, he may alſo be bailed if the Approver waive [a] his Appeal, or be vanquiſhed, [b] unleſs there be ſome other Cauſe to detain him in Priſon, as the Appeal of ſome other Approver, *&c.* And if a Perſon diſabled by Law to become an Approver, as one attainted, [c] *&c.* appeal another of High Treaſon, it ſeems that the Perſon ſo appealed ought to be bound [d] to his Good Behaviour towards the King: But [e] if ſuch Perſon had appealed him of Felony only, it ſeems that he ought to have been wholly diſcharged, if there had been no other Accuſation againſt him.

H. P. C. 102. 2 Inſt. 188. Regiſter, 269. b.

[a] 25 Ed. 3. 42. pl. 27. H. P. C. 102. Fitz. Mainprise, 1. 2 Inſt. 288.

[b] 25 Ed. 3. 42. pl. 31. Fitz. Mainprise, 2.

[c] H. P. C. 192.

[d] Fitz. coron. 387.

[e] Bro. coron. 81. 211. 17 Aſſ. pl. 4 11 Aſſ. pl. 27.

Sect. 44. IV. *Thieves openly known and notorious*, who, as it ſeems, ought not to be bailed for any freſh Felony, whereof there is probable Evidence againſt them. But how far Perſons accuſed of any Crime, ſhall be ſo far eſteemed likely to have committed it, from their former ſcandalous Behaviour, as to be preſumed guilty upon ſlight Evidence, ſeems in great meaſure to be left to the Diſcretion [f] of the Perſon who hath Power to bail them; who, upon conſideration of the Circumſtances of the whole Mat-

[f] H. P. C. 102.

ter,

ter, and the Probabilities of both Sides, if he find it reaſonable ſtrongly to preſume them to be guilty, ought not to bail but commit them.

Sect. 45. V. *Perſons taken for open and manifeſt Offences*, which ſeems to be underſtood of inferior Crimes of an enormous Nature, under the degree of Felony, as dangerous Riots, [a] favouring of High Treaſon, [b] ſcandalous Extortions, Conſpiracies, [c] by Juſtices, *&c.* violent and exorbitant Reſcouſes [d] of Perſons arreſted by vertue of the King's Writs, Miſpriſion [e] of Treaſon, *Præmunire*, [f] Maim, and ſuch like heinous Offences, whereof no one who is notoriouſly Guilty, ſeems to be bailable by the Intent of this Statute; for notwithſtanding in the latter Part of it, it be ſaid generally, That thoſe who are accuſed of a Treſpaſs, for which a Man ſhall not loſe Life or Member, are repleviſable; yet upon the Conſtruction of the whole it ſeems reaſonable to qualify the Generality of that Expreſſion with this Limitation, that ſuch Accuſation ought to be either on a light Suſpicion, or if it be on plain and unqueſtionable Evidence that the Offence ought to be inconſiderable, for if all Perſons whatſoever ſhall be repleviſable for Offences not touching Life or Member, let their Guilt be never ſo notorious, the abovementioned general unlimited Clauſe, that thoſe who are taken for open Offences ſhall be irrepleviſable, muſt be reſtrained to Felonies and Offences touching Member, which ſeems contrary to the moſt obvious reaſonable Purport of it, and alſo to common Practice, and that allowed general Rule, That Bail is only then proper where it ſtands indifferent whether the Party were Guilty or Innocent; *ſed quære.* Yet it ſeems to be in great meaſure left to the Diſcretion of the Perſon who has Power to admit others to bail, to judge in what Caſes their Crime is ſo flagrant and enormous, that they ought not to have the Benefit of it.

[a] Dalt. cap. 114.
[b] Bro Mainprife 62.
42 Aſſ pl 5.
[c] Coke Bail & Mainprize, Ch. 5.
27 Aſſ pl 12.
[d] Keilw. 165. b.
Firz. Execution 147.
13 H. 7. 21. b.
Raſtal 380. pl. 6.
[e] H. P. C. 168.
[f] 6 H. 7. 1. b.

Supr. Sect 44.

Of thoſe who are excluded by the Purview of the ſaid Statute, from the benefit of a Replevin, in reſpect of the heinouſneſs of the Crime alledged againſt them, there are four kinds.

1. *Thoſe who are taken for Arſon.*
2. *Thoſe who are taken for falſe Money.*
3. *Thoſe who are taken for falſifying the King's Seal.*
4. *Thoſe who are taken for Treaſon, which touches the King himſelf.*

Sect. 46. And all ſuch Perſons being expreſsly declared to be irrepleviſable, it ſeems clear, That they can in no Caſe be delivered out of Priſon by the Sheriff, either by Vertue of the ſaid Writ of *Homine replegiando*, or without it: Yet if a Perſon at large be accuſed before a Sheriff, on a light Suſpicion of any of theſe, or of any other of the abovementioned Crimes, which always have been agreed to be irrepleviſable, as of Homicide, *&c.* it ſeems by no means to follow either from the Words or Intention of the Statute, That the Sheriff is bound to keep him in Priſon 'till he be delivered by due Courſe of Law; but in ſuch a Caſe it ſeems to be more reaſonable, that he take Surety of him to appear in a proper Court to anſwer ſuch Accuſation; for it ſeems extreamly harſh, and contrary to the firſt Principles of the Law, which favours nothing more than the Liberty of the Subject, to put an Officer under a Neceſſity of depriving a Man of his Liberty upon every Accuſation of ſuch a Crime, be it never ſo weakly grounded. And the Words of the Statute, declaring Perſons to be irrepleviſable for ſuch Crimes, ſeem clearly applicable to ſuch only as are under an actual Impriſonment, and not to thoſe who are barely accuſed; for that none can be properly ſaid

to

to be replevied, but those who being actually imprisoned, are, upon finding Pledges, delivered out of Custody; from which it follows, That Persons not imprisoned are not within the Statute: Nay, the Law is so far from obliging a Sheriff to imprison a Man on every Accusation whatsoever of such Crimes, that it subjects him, as well as any other Person, to an Action of False Imprisonment, if he does it without a reasonable Ground; as hath been more fully shewn in the Chapters concerning Arrests. But if a Person be actually under an Arrest, either of a Magistrate or private Person, for any of the abovementioned Crimes, it seems clear from the express Words of the Statute, that the Sheriff cannot replevy him; and it seems, that at the Common Law he ought to have safely detained the Party so arrested 'till he could have obtained his legal Deliverance, and that the Person so arrested had no Remedy but by Indictment or Action of False Imprisonment against those who arrested and delivered him to the Sheriff, on a groundless Suspicion. But how far the Law may at this Day be altered in this Point, by the universal and allowed Practice of Sheriffs receiving no Person into their Custody, for any Crime, without the Warrant of some Magistrate, shall be more fully considered in the next Chapter.

Sect. 47. It is certain, That the Court of King's Bench still may, and always might, bail Persons in Custody for any of these Crimes, notwithstanding this Statute; yet in Discretion it seldom uses this Power but in very special Cases, as shall be shewn in the following Part of this Chapter.

2 Inst. 189.
40 Ass. 33.

And now I am to consider that Part of the Purview of the said Statute, which shews what Persons are repleviable; for the better understanding whereof, I shall endeavour to explain.

1. The Branch relating to Persons accused as Principals.
2. That which concerns those who are charged as Accessories.

Sect. 48. As to the first Branch, First, *Those who are indicted of Larceny by Inquests taken before Sheriffs, or Bailiffs, by their Office*, that is, before Sheriffs in their Torns, and Lords in their Leets, are expressly declared to be repleviable; and according to some Opinions, those who are indicted, or appealed in any other Court, of any other Felony, not expressly declared by the Statute to be irrepleviable, as Robbery or Burglary, *&c.* are repleviable by the Sheriff, *ex officio*, without Writ, within the Equity of this Clause: Yet the Authorities which are brought to warrant this Opinion, relate only to the Bailment of Persons by superior Courts, upon Indictments or Appeals of such Crimes before such Courts, and do by no means prove that such Persons are repleviable by the Sheriff *ex officio*, without Writ: And it is observable, that the Writs of Mainprize in the Register, for Persons indicted only of Trespass, before Justices of Peace, expressly declare, That such Persons cannot be delivered out of Prison without the King's special Command; from whence it seems to follow, That such Persons are not within the common Benefit of a Replevin by the Sheriff, without some such special Command. And if Persons indicted of Trespass only, before Justices of Peace, are not within the ordinary Remedy of a Replevin by the Sheriff without a Writ, surely it cannot be thought, that Persons indicted of higher Crimes, and before Superior Courts, can be any way intituled to it: However, inasmuch as the said Statute of *Westminster* 1. expressly allows Persons indicted of Larceny

2 Inst. 190.
S. P. C. 74. Letter C
H. P. C. 106.
Dalt cap 114.
29 Ass. pl. 44.
16 Ed. 4 5. pl. 4.
Coke Bail & Mainprise, cap. 5.
Register 270. b. 271.

Larceny before the Sheriff the ordinary Remedy of a Replevin, and expreſsly excludes ſome other particular Felonies, and ſays nothing of others, it ſeems a reaſonable Conſtruction of the Statute, That the Sheriff might by Vertue of it, either with or without Writ, replevy thoſe who were indicted before himſelf, or at a Court-Leet, of thoſe other Felonies not expreſsly excepted, as well as thoſe indicted of Larceny only. And the Statute leaving ſuch a Latitude to the Sheriff in relation to the Perſons ſo indicted before himſelf, or at a Court Leet, ithath been uſual for ſuperior Courts, (who though they be not within the Statute, have yet always had a great Regard to the Rules preſcribed by it) to uſe the ſame Liberty in relation to ſuch Crimes, and ſometimes greater, for ſuch ſpecial Reaſons, and in ſuch ſpecial Caſes, as ſhall be ſet forth more at large in the following part of this Chapter. Yet notwithſtanding the Statute ſeems generally to allow the Benefit of a Replevin to all thoſe who are indicted of Larceny, *&c.* without any Limitation; yet it hath been always conſtrued to intend only that ſuch Perſons indicted of a Grand Larceny, as are of a good Reputation, ſhall be repleviſable; and therefore if there be ſtrong Preſumptions of their Guilt, it ſeems that they ought not to be bailed; but this is in great Meaſure to be left to Diſcretion.

Regiſter, 269. 2 Inſt. 190. H. P. C. 100. 16 Ed. 4, 5. S. P. L. 74 c

Sect. 49. Secondly, *Thoſe who are impriſoned for a light Suſpicion*, are likewiſe declared by the Statute to be repleviſable; yet notwithſtanding the Words are general, it hath always been taken to be the Intent of them, That the Perſons ſo impriſoned ought to be of a good Reputation: Alſo it ſeems clear, That the Statute means only ſuch Perſons as are impriſoned for Crimes not expreſsly excepted by it from the Benefit of a Replevin; and therefore that this Branch cannot extend to Perſons impriſoned for the Treaſons mentioned in the Statute, Arſon, or Homicide, but only to thoſe taken for Larceny, Robbery, Burglary, and ſuch like Felonies, *&c.*

Regiſter, 83. b 269. F. N. B. 250. c. 2 Inſt. 190.

Sect. 50. Thirdly, Thoſe who are impriſoned *for Petit Larceny, which does not amount above the value of* 12 d. are alſo declared by the Statute to be repleviſable, *if they have not been accuſed of ſome other Larceny before:* And it ſeems to be agreed, That there is no Neceſſity that ſuch Perſons be of good Reputation; yet upon the Conſtruction of the whole Statute, if ſuch Perſons be taken with the Manner, or confeſs the Fact, *&c.* or their Crime be otherwiſe open and manifeſt, it ſeems that they ought not to be bailed; but if there be any Colour of Probability for their Innocence, it ſeems moſt agreeable to the Intention of the Statute to bail them.

2 Inſt. 190. Regiſter, 269. b. F. N. B. 250. c. Vide Supra Sect. 45.

Sect. 51. Fourthly, *Perſons accuſed of other Treſpaſs, for which a Man ought not to loſe Life or Member*, are declared by the Statute to be repleviſable; yet perhaps the generallity of this Clauſe is reſtrained by that other Clauſe which declares, That Perſons taken for open and manifeſt Offences ſhall not be replevied, as hath been more fully ſhewn *Sect.* 45.

Sect. 52. Fifthly, The Appellee of an Approver is alſo expreſsly declared to be bailable after the Death of the Approver, unleſs he be a notorious Felon. But having already incidentally ſhewn *Sect.* 43. in what Caſes ſuch an Appellee is repleviſable, I ſhall refer the Reader, for this Matter, to what is there ſaid concerning it.

Sect. 53. Secondly, As to the Branch concerning thoſe who are charged as Acceſſories, which is in the following Words, *Thoſe who are accuſed of the receipt of Thieves or Felons, or of Commandment, or of Force,*

or of Aid of Felony done, ſhall be repleviſable, &c. it is obſervable, That notwithſtanding the Statute mentions only thoſe who are Acceſſory by receiving Felons, or by Commandment, Force or Aid, yet all thoſe who are acceſſory to a Felony any [a] other way, as by Perſuaſion or any other Procurement, or Abetment, have always been taken to be within the Equity of it; and moſt [b] of the Books relating to this Matter ſeem generally to hold, That all Acceſſories, whether to Homicide or any other Felony, are bailable 'till the Principal be convicted, or attainted; and that they are bailable even after ſuch Conviction or Attainder, upon their [c] pleading to the Indictment, and do not expreſs any Limitation or Reſtriction, that they be of good Fame, or but ſlightly ſuſpected, *&c.* And in the Caſe [e] of 25 *Ed.* 3. 44. *pl.* 14. wherein a Perſon appealed of Murder, as having holden the deceaſed in his Arms while the other killed him, was not let to Mainpriſe, the Reaſon given for it by the Reporter is, becauſe the Defendant was in a manner a Principal; for that otherwiſe being an Acceſſory only, he ought to have been let to Mainpriſe by the Intent of the Statute. Yet I find it made a Query in the Year Book of 21 [f] *Ed.* 4. Whether Acceſſories are to be let to bail of Courſe? And perhaps it may be more reaſonable to intend, in the above-cited Caſe of 25 *Ed.* 3. That ſuch Perſon was denied the Benefit of Mainpriſe by reaſon of the Notoriety of his Guilt; for it ſeems clear, both from the [g] *Regiſter*, [h] *Fitzherbert*, and [i] *Dalton*, That Acceſſories to Felonies are not to be bailed unleſs they be of good Reputation; and if the want of a good Reputation, which is at moſt but a very ſlight Inducement to preſume them guilty of a particular Crime, be a good Cauſe to exclude them from the Benefit of Mainpriſe, which is given them by the general Words of the Statute, it ſeems ſtrange, that ſtrong and unqueſtionable Evidence of their Guilt ſhould not much more exclude them from it; eſpecially conſidering that it is an allowed Rule, [k] That Bail is only proper where it ſtands indifferent whether the Perſon accuſed were guilty or innocent. And ſince later Statutes have, in many Caſes, excluded Acceſſories before the Fact from the Benefit of the Clergy, it ſeems abſurd to ſay, That Perſons notoriouſly guilty of being Acceſſory to Crimes which exclude them from the Benefit of the Clergy, ſhall be admitted to Bail; whereas if they had been committed to Priſon on the like Evidence of Guilt, as Principals, for Felonies within the Benefit of the Clergy, or even for inferior Offences of an enormous Nature, they could not have had the like Priviledge: And therefore, ſince the general Words of the Statute concerning the replevyſing of Acceſſories, are agreed to receive the above-mentioned Limitations, That they ought to be of a good Reputation, and alſo to plead firſt to the Indictment, if the Principal be attainted; why ſhould it not be reaſonable to admit this farther Reſtriction, That their Guilt be not notorious? which ſeems admitted to be implied in moſt of the other Clauſes of the Statute, which yet are penned in as general Words as that relating to Acceſſories. But this Matter ſeems at this Day to be put beyond all Queſtion, by 31 *Car.* 2. *cap.* 2. Par. 21. By which it is recited, *That many times Perſons charged with Petit Treaſon, or Felony, or as Acceſſories thereunto, are committed on Suſpicion only, whereupon they are bailable or not, according as the Circumſtances making out that Suſpicion, are more or leſs weighty,* &c. And thereupon it is enacted, *That no Perſon ſo charged, ſhall be removed or bailed by Vertue of that Act, in other manner than he might before.* From which it ſeems clearly to follow, That where there are ſtrong Preſumptions of Guilt, againſt a Perſon ſo charged, he neither was bailable before that Statute, nor is now bailable by Vertue of it.

As

[a] Regiſter. 270. S. P. C. 71. F. N. B. 250. E. H. P. C. 100.
[b] S. P. C. 71. Bro Mainpriſe, 6, 11. 22, 54. 58. H. P. C. 100. Coke Bail & Mainpriſe. Cap. 5. Dy. 120. pl. 10. 25 Ed. 3. 42. pl. 14 40 Ed. 42. pl. 21. 50 Ed. 3. 15. a. 29 Aſſ. 44. 40 Aſſ. 8.
[c] S. P. C. 71. H. P. C. 100. Bro Mainpriſe 58, 64. 40 Ed. 3. 42. pl. 22. 43 Ed. 3. 17. 40 Aſſ. 8. Cont. 27 Ed. 3. 94. pl. 3.
[e] Fitz. coron. 135.
[f] 21 Ed. 4. 71. Bro Mainpriſe, 78.
[g] Regiſter. 270.
[h] F. N. B. 250. e.
[i] Dalt. cap. 114.
[k] Supra Sect. 40.

As to the ſecond Point, *viz.* In what Caſes Bail is grantable by a Juſtice of Peace, I ſhall endeavour to ſhew,

1. How far it is grantable by Conſtruction of the Statutes and Commiſſion which give Juſtices of Peace a Juriſdiction over certain Crimes, without ſaying any thing concerning the Power of granting Bail.
2. How far it is grantable by the Statutes ſpecially relating to the Power of granting Bail.

Sect. 54. As to the firſt Point it ſeems, That where-ever Juſtices of Peace have Juriſdiction of a Crime, they may bail the Perſon indicted before them of ſuch Crime, upon ſuch Circumſtances for which other Courts might bail the Perſon ſo indicted before them; for that it ſeems to be a good general Rule, That ſo far as any Perſons are Judges of any Crime, ſo far they have Power of bailing a Perſon indicted before them of ſuch Crime: And upon this Ground it ſeems clear, That any two Juſtices of Peace, whereof one is of the *Quorum*, may, of common Right, bail Perſons indicted before the Seſſions of Juſtices of Peace, for that any two ſuch Juſtices may hear and determine the Indictment. * Alſo it hath been holden, That any one Juſtice of Peace hath the like Power in relation to Perſons ſo indicted, becauſe every ſuch Juſtice being a Judge of the Court which is to determine the Offence, ſeems conſequently to have a diſcretionary Power of judging whether it be bailable, and of admitting the Party to bail. And this ſeems to be implied by the Statute of 1 *Ric.* 3. *cap.* 3. which giving one Juſtice of Peace Power of bailing Perſons arreſted for Felony, *in like Form as if ſuch Perſons had been indicted at Seſſions*, clearly ſuppoſes, that if ſuch Perſons had been indicted at Seſſions, they might have been bailed by any one Juſtice: And if any one Juſtice of Peace had ſuch Power of bailing the Perſons ſo indicted at Seſſions, before the Statutes ſpecially relating to the Power of Juſtices of Peace in granting Bail, it ſeems, That he has ſtill the ſame Power in relation to Perſons ſo indicted of any bailable Crime under the degree of Felony, becauſe the ſaid Statutes ſeem not to reſtrain him in any ſuch Caſe, under the degree of Felony, from any Power which he lawfully might claim before. Alſo it ſeems to be agreed, That any one Juſtice of Peace might always in his Diſcretion either bail or impriſon one who has given another a dangerous Wound, according as it ſhall appear from the whole Circumſtances, that the Party is moſt likely to live or dye, for that every ſuch Juſtice being a principal Conſervaror of the Peace, the Offence at preſent being only an enormous Breach thereof, and no Felony, ſeems properly to come under his Conuſance.

H. P. C. 105. 106. Coke Bail & Mainpriſe, Chap. 6. Lamb. 347. 348.

*See the Books above cited.

Cromp. 197. 234, 235.

H. P. C. 105.

B. 1. Chap. 63. Sect. 19.

Sect. 55. As to the ſecond Point, *viz.* How far Bail is grantable by Juſtices of Peace, by Vertute of the Statutes ſpecially relating to their Power of granting Bail, it is recited by 1 *R.* 3. *cap.* 3. *That divers Perſons had been daily arreſted and impriſoned for Suſpicion of Felony, ſometime of Malice, and ſometime of a light Suſpicion, and ſo kept in Priſon, without Bail or Mainprize, to their great Vexation and Trouble: And thereupon it is enacted, That every Juſtice of Peace in every Shire, City or Town, may, by his or their Diſcretion, let ſuch Priſoners and Perſons ſo arreſted to Bail or Mainpriſe, in like Form as though the ſame Priſoners, or Perſons, were indicted thereof of Record, before the ſame Juſtices at their Seſſions.*

Sect. 56. But it is recited, by 3 *H.* 7. *cap.* 3. *That by Colour of the ſaid Statute of* 1 R. 3. *divers Perſons which were not mainpernable, were oftentimes let to Bail and Mainpriſe by Juſtices of Peace, againſt the due Form of Law, whereby*

whereby many Felons had escaped, to the great Displeasure of the King, and Annoiance of his Liege People; and thereupon it is enacted, *That the Justices of Peace in every Shire, City, and Town, or two of them at the least, whereof one to be of the* Quorum, *have Authority and Power to let any such Prisoners, or Persons mainprnable by Law, that have been imprisoned within their several Counties, City or Town, to Bail or Mainprise, unto their next general Sessions, or unto the next general Gaol Delivery of the same Goals, in every Shire, City, or Town, as well within Franchises as without, where any Gaols be, or hereafter shall be: And that the said Justices of Peace, or one of them, so taking any such Bail or Mainprise, do certify the same at the next general Sessions of the Peace, or the next general Gaol-Delivery of any such Gaol, in every such County, City or Town, next following after any such Bail or Mainprise so taken, on pain to forfeit to the King for every Default thereupon recorded,* 10 l. *And that the aforesaid Act, giving Authority and Power in the Premises, to any Justice of the Peace by himself, be in that behalf utterly void, and of none effect.*

Sect. 57. And it is recited, by 1 & 2 *Ph. & M.* 13. *That since the said Statute of* 3 H. 7. *one Justice of Peace, in the Name of himself, and one other of the Justices his Companion, not making the said Justice Party nor Privy unto the Case wherefore the Prisoner should be bailed, had oftentimes by sinister Labor and Means, set at large the greatest and notablest Offenders, such as be not repleviſable by the Laws of this Realm; and yet the rather to hide their Affections in that behalf, had signified the Cause of their Apprehension to be only for Suspicion of Felony, whereby the said Offenders had and did daily escape Punishment, &c.* And thereupon it is enacted, *That from the first Day of* April *then next coming, no Justice or Justices of Peace, shall let to Bail or Mainprise any such Person or Persons, which for any Offence or Offences, by them or any of them committed, be declared not to be repleviſed, or be forbidden to be repleviſed or bailed by the above-mentioned Statute of* Westminster 1.

Sect 58. And it is farther enacted, *Par.* 3. *That any Person or Persons arrested for Manslaughter or Felony, or Suspicion of Manslaughter or Felony, being bailable by the Law, shall not be let to Bail or Mainprise by any Justices of the Peace if it be not in open Sessions, except it be by two Justices of Peace at the least, whereof one to be of the* Quorum, *and the same Justices to be present together at the time of the said Bailment or Mainprise; which Bailment or Mainprise they shall certify in Writing subscribed or signed with their own Hands, at the next general Gaol-Delivery to be holden within the County where the said Person or Persons shall be arrested or suspected.*

Sect. 59. And it is farther enacted, Par. 4. *That the said Justices, or one of them, being of the* Quorum, *when any such Prisoner is brought before them for any Manslaughter or Felony, before any Bailment or Mainprize, shall take the Examination of the said Prisoner, and Information of them that bring him, of the Fact and Circumstances thereof, and the same, or as much thereof as shall be material to prove the Felony, shall put in Writing before they make the same Bailment; which said Examination, together with the said Bailment, the said Justices shall certify at the next general Gaol-Delivery, to be holden within the Limits of their Commission.*

Sect. 60. And it is farther enacted, Par. 5. *That the said Justices shall have Authority to bind all such by Recognisance or Obligation, as do declare any thing material, to prove the said Offences or Felonies, to appear at the next general Gaol-Delivery to be holden within the County, City, or Town-Corporate where the Trial thereof shall be, and then and there to give Evidence against the Party at the time of his Trial; and shall certify as well the same Evidence, as such Bond or Bonds in writing, as he shall take, at or before the time of his said Trial thereof to be had or made. And in case any Justice of Peace of* Quorum, *shall*

ſhall offend in any thing, contrary to the true intent and meaning of this Act; the Juſtices of Gaol-Delivery, where ſuch Offence ſhall happen to be committed, upon due Proof thereof, by Examination before them, ſhall for every ſuch Offence, ſet ſuch Fine on every of the ſame Juſtices, as the ſame Juſtices of Gaol-Delivery ſhall think meet, &c.

Sect. 61. But it is provided, Par. 6. *That Juſtices of Peace, and Coroners, within the City of* London, *and the County of* Middleſex, *and in other Cities, Boroughs, and Towns Corporate, ſhall within their ſeveral Juriſdictions, have Authority to let to bail Felons and Priſoners, in ſuch Manner and Form as they had been before accuſtomed; and alſo ſhall take Examinations and Bonds, as is aforeſaid, upon every Bailment by them made, and certify every ſuch Bailment, Bond and Examination, at the next general Gaol-Delivery*, &c.

From theſe Statutes the following Particulars appear moſt obſervable.

Sect. 62. Firſt, That it ſeems clearly to be imply'd by the above-mentioned Statute of 1 *R.* 3. 3. which authoriſed any one Juſtice of Peace to bail a Perſon on a ſlight Suſpicion of Felony, in like manner as if ſuch Perſon had been indicted at Seſſions, That before that Statute, Juſtices of Peace could bail thoſe only for Felony, who had been indicted of it before them. And by Parity of Reaſon it ſeems alſo to follow, That they had no Power to bail Perſons for any other Crime before ſuch Indictment, unleſs it were an Offence directly tending to the Breach of the Peace, the bailing of Perſons for which ſeems properly to come under their Conuſance as Conſervators of the Peace: And therefore it ſeems difficult to maintain the Power of one Juſtice of the Peace to bail a Perſon for any other Crime, unleſs it be by ſome Statute limited to the Conuſance of one Juſtice, or the Party have been indicted for it at Seſſions, becauſe the Commiſſion in giving a Juſtice a general Juriſdiction over any Crime, ſhall be conſtrued ſo far only to give him a Power to bail a Perſon accuſed of it, as it makes him a Judge of it, which he cannot be till it come regularly before him by Indictment; and the Statutes above-mentioned ſpecially relating to the Power of Juſtices of Peace, in granting Bail, expreſsly require the Connuſance of two Juſtices.

Coke, Bail and Mainprise, cap. 6.

Supra. Sect. 54.

Sect. 63. Secondly, That Juſtices of Peace have no Power to bail any Perſon not repleviſable by the above-mentioned Statute of *Weſtminſter* 1. 15. from whence it ſeems to follow, That a Perſon under the actual Commitment or Arreſt of any other Magiſtrate, or even of a private Perſon, for any Crime declared to be irrepleviſable by that Statute, as Treaſon againſt the King's Perſon, Arſon, *&c.* cannot be delivered from his Impriſonment by the Bailment of any Juſtice of Peace. Yet if a Perſon at large be only accuſed of any ſuch Crime, on a ſlight Suſpicion, before a Juſtice of Peace, it ſeems that the Juſtice ought not to commit him, but to take Surety of him to appear before a proper Court, as hath been more fully ſhewn in relation to the Sheriff, *Sect.* 46. And inaſmuch as the above-mentioned Statute of 1 & 2 *Ph. & M.* 13. expreſsly mentions the bailing of Perſons for Manſlaughter, as well as for other Felonies, there can be no Doubt, but that Juſtices of Peace may, by Force thereof, ſafely bail any Perſon impriſoned on a ſlight Suſpicion of a Fact, clearly appearing to be no higher an Offence than Manſlaughter, and much more if it appear to amount to no more than Homicide by Miſadventure, or in Self-defence. Yet it ſeems to be agreed, That ſuch Juſtices muſt, at their Peril, take care that the Offence in Truth amounted not to Murder; and that they ought in no caſe to bail any Perſon who manifeſtly appears to

Vide Supra. Section. 33, 34.

1 Rol. Rep. 268. Dalt cap 114. H. P. C. 99.

Lamb. 346, 347.

have been guilty of any of the Homicides above-mentioned, either by his own Confeſſion, or the Notoriety of the Fact, not only becauſe the above-mentioned Statute of *Weſtminſter* 1. 15. which is the Pattern preſcribed by 1 & 2 *Ph. & M.* for the direction of Juſtices of Peace in relation to Bail, expreſsly excludes all Perſons from the Benefit of it which are guilty of open and manifeſt Offences; but alſo becauſe the Statute of *Gloceſter*, *cap.* 9. is expreſs, That all Perſons who are guilty of Homicide, by Miſadventure or in Self-defence, ſhall be kept in Priſon 'till the next coming of the Juſtices Itinerant, or of Gaol-Delivery.

Supra Sect. 44, 45.

2 Inſt. 314, 315.

Sect. 64. Thirdly, That the chief Import of theſe Statutes is to ſhew in what Manner Perſons are to be bailed by Juſtices of Peace, and not to declare what Perſons are bailable by them; in relation to which Matter, the old Rules of the Statute of *Weſtminſter* 1. are generally ſtill to be followed, which extending only to criminal Offences puniſhable in the ordinary way by Indictment before the Sheriff, *&c.* give no Power to bail Perſons taken on Proceſs in Civil Actions, or for Contempts to Superior Courts, as by Proceſs of Rebellion out of Chancery. And therefore by a reaſonable Conſtruction of all theſe Statutes, Juſtices of Peace have no Power in any ſuch Caſes to admit any Perſon to bail.

Dalt. cap 114. Cromp. 152. H. P. C. 105.

Sect. 65. As to the third Point, *viz.* Where Bail is grantable by the Juſtices of Gaol-Delivery, it ſeems to be clearly ſettled [a] at this Day, That ſuch Juſtices may bail any Perſon convicted before them of Homicide by Miſadventure, or in Self-defence, the better to enable him to purchaſe his Pardon: And if a Perſon convicted of Manſlaughter before ſuch Juſtices, purchaſe his Pardon, it ſeems, that they may [b] bail him, even after their Seſſions is determined, 'till the next Seſſions of Gaol-Delivery, that he may come in then and plead his Pardon, for that the Power of ſuch Juſtices ſeems [c] to continue for ſuch Purpoſes after their Seſſions. Alſo [d] if a Man be convicted of Manſlaughter before ſuch Juſtices, againſt plain Evidence, it is ſaid that they may bail him till the next Seſſions of Gaol-Delivery, in order to purchaſe his Pardon in the mean time. But it ſeems, [e] That Juſtices of Peace have no Power to bail a Man in any of theſe Caſes, becauſe they are tied up for the moſt Part to the Rules preſcribed by the above-mentioned Statute of *Weſtminſter* 1. But this Statute not [f] extending to Juſtices of Gaol-Delivery, ſeems to leave them a diſcretionary Power in thoſe Caſes, wherein it reſtrains the Sheriff from admitting Perſons to bail. And therefore if a Defendant in an Appeal of Death, plead an Excommunication in Diſability of the Plaintiff, it ſeems to be holden by *Staundford*, [g] That ſuch Juſtices may bail the Defendant from Day to Day, till the Plaintiff ſhall be abſolved, for that otherwiſe the Defendant might lee in Priſon for ever, without any Opportunity of coming to his Trial. But it is obſervable, That the Books [h] which are cited for the Maintenance of this Opinion, ſpeak only of an Appeal of Robbery: Yet if Juſtices of Gaol-Delivery have ſuch Power of bailing Perſons in the Caſe of Death, on the Circumſtances above-mentioned, as it ſeems agreed in the Caſes above-cited that they have, I do not find any Reaſon why they may not as well upon other ſuch like Circumſtances, bail Perſons indicted or appealed before them of any other Crime, in ſuch manner as the Court of King's Bench may do, as ſhall be more fully ſhewn under the next Point.

[a] Cromp. 154. a. H. P. C. 101, 104, 105. Fitz. Coron. 361. Dalt. cap. 114. F. N. B. 246. c. S. P. C. 15. C. 16. D. Con. 25 Ed. 3. 42. pl. 27. S. P. C. 74. D. Fitz. Coron. 354. Mainpriſe, 1.

[b] Crompt. 153. b. Bro. Mainpriſe, 94. H. P. C. 101.

[c] Vide Supra. cap. 6. Sect. 7.

[d] Cromp. 154. a.

[e] H. P. C. 104, 105. Vide Supra. Sect. 63. Cont. Dalt cap. 114.

[f] 2 Inſt. 185. 186.

[g] S. P. C. 72. f.

[h] Fitz. Mainpriſe, 6. 3 Aſſ. pl. 12. Salk. 61. *ſeems contrary.*

As to the Fourth Point, *viz.* Where Bail is grantable by the Courts of *Weſtminſter-Hall*, I ſhall endeavour to ſhew.

1. Where it is grantable by the Court of King's Bench.
2. Where by the other Courts of *Weſtminſter-Hall.*

As to the firſt of theſe Points I ſhall conſider,

1. Where Bail is grantable by the Court of King's Bench, to a Perſon impriſoned by the King's ſpecial Command, or by the Order of his Privy Council.
2. Where to a Perſon committed by either Houſe of Parliament.
3. Where to one committed by the Court of Chancery.
4. Where to one committed by an Inferior Court of Record.
5. Where to one expreſsly excluded by the abovementioned Statute of *Weſtminſter* 1. Chap. 15. from the common Benefit of a Replevin by the Sheriff.

Sect. 66. As to the firſt of theſe Particulars, *viz.* Where Bail is grantable by the Court of King's Bench to a Perſon impriſoned by the King's ſpecial Command, or by the Order of the Privy Council; I do not find but that where-ever [a] a Commitment by the Privy Council hath ſpecially expreſſed the Crime for which the Party hath been committed, this Court has always admitted him to bail, on the like Circumſtances on which, in Diſcretion, it will grant Bail on other Commitments: [b] And where-ever it has appeared, that Perſons have been impriſoned by colour of an uſurped Authority, pretended to be derived from any Patent whatſoever, contrary to Law, it ſeems that the ſaid Court hath always diſcharged the Perſons ſo impriſoned, without Bail. But there have been formerly many Opinions, [c] That Perſons committed by the Special Command of the King, or of his Privy Council, without expreſſing any other Cauſe of the Commitment, were not bailable by any Court whatſoever, without ſome Intimation of the King's Conſent to ſuch Bailment, by Letter from the Privy Council, or otherwiſe. And a Diſtinction [d] was taken by ſome between a Commitment by one of the Privy Council, and a Commitment by the whole Body; and that the former ought indeed to ſet forth ſome other Cauſe of the Commitment beſides the Command of the Perſon who made it; but that the latter needed not any.

Sect. 67. But this Matter came afterwards to be very ſolemnly debated in the famous Caſe [e] of Sir *John Corbet*, and others, who being impriſoned by a Warrant from the Privy Council, about the third Year of the Reign of King *Charles* the Firſt, moved the Court of King's Bench to admit them to Bail upon their *Habeas Corpus*; whereon it was returned, That they were detained in the Priſon of the *Fleet* by the ſpecial Command of the King, ſignified to the Warden by a Warrant of ſome of the Members of the Privy Council, in which Warrant no other Cauſe of the Impriſonment was contained but ſuch Special Command: And it was ſtrongly urged on the Behalf of the Priſoners, That ſuch Impriſonment is againſt the Statute of *Magna Charta, chap.* 29. which provides, *That no Freeman ſhall be taken or impriſoned, and that the King will not paſs upon him, nor condemn him, but by the Judgment of his Peers, or the Law of the Land*; and alſo againſt many other Statutes [f] made in Affirmance of *Magna Charta*, by which it is ordained, *That no Man ſhall be taken by Petition, or Suggeſtion, made to the King or to his Council, unleſs it be by Indictment or Preſentment, or by Proceſs by Original Writ; and that no Man ſhall be impriſoned*, &c. *without being brought to anſwer by due Proceſs of Law; nor be put to anſwer without Preſentment before Juſtices, or matter of Record, or by due Proceſs, and Writ Original.*

[a] 5 Mod. 78. 1 Syd. 143. 1. And 297. 298.
[b] 1 Leon. 70. Palm. 559. 1 Leon. 70. 1. And 297.
[c] 33 H. 6. 28. b. 1. And 298. 1 Rol. Rep. 134, 192. pl. 31, 32, 219. pl. 22. Con. Mo. 839. 1 And 158. See the Arguments on the *Habeas Corpus* concerning Loans, 81, 82, &c.
[d] 1 Leon. 70. 71.
[e] See the Arguments on the *Habeas Corpus* concerning Loans, & Ruſhworth's Collections, 1 Part. Fol. 458, &c.
[f] 25 Ed. 3. 4. 28 Ed. 3. 3. 42 Ed. 3. 3.

Original. And it was argued, That the Liberty of the Subject would be precarious, and lie at the King's Mercy, if Persons who happen to incur his Displeasure, for what perhaps the Law esteems no Crime, should by means of such a Commitment be liable to be for ever imprisoned, without any Possibility of Redress; and that it seems inconsistent with natural Justice to expose a Man to so severe a Punishment for a supposed Crime alledged against him, without giving him an Opportunity of clearing himself by a lawful Trial. And it was farther urged, That, according to the Opinion of Sir *John Markham*, in the time of King *Edward* the Fourth, the King could not so much as arrest a Man upon Suspicion of Treason or Felony, as any of his Subjects may; for that if the King should do Wrong, the Party could have no Action against him. Also it was insisted, That the Preamble of the Statute of *Westminster* 1. 15. which declares, That Persons imprisoned by the King's Command have always been taken to be irrepleviable, must be intended only of a Replevin by the common Writ *de Homine replegiando*, or by the Sheriff, *ex officio*, without Writ, for that it speaks only of a Replevin by Sheriffs and others; and therefore shall not be taken to extend to superior Courts: And it was never thought, that the Court of King's Bench was restrained by it from bailing Persons imprisoned for Homicide; and yet all such are equally declared by the Statute to be irrepleviable: Also many Precedents were alledged, whereby it appeared, That Persons committed by the King's special Command had been discharged upon Writs of *Habeas Corpus*.

1 H. 7. 4. b.

Sect. 67. But on the other Side it was argued, That such Commitments could not reasonably be intended to be against the Purview of the Statutes above-cited, inasmuch as the said Statute of *Westminster* 1. 15. which was made in the very next Reign after that in which the Statute of *Magna Charta* was made, it was declared to be a settled and undoubted Point, That Persons committed by the Command of the King (which, as it seems to be agreed, is to be understood of the King's special, absolute, and extrajudicial Command) are not repleviable; and it cannot be imagined that so high a Regard should be paid to such a Commitment, if it were thought to be illegal, and contrary to *Magna Charta*. And it was insisted, That Commitments of this kind have often been allowed by the Courts [a] of Justice, and are mentioned by Authors [b] of the best Credit since the above-cited Statutes, without any the least Objection to their Legality, and as depriving the Party imprisoned by them from the common Benefit of the Writ of Replevin. And it was also strongly urged, That there are often secret Causes not fit to be divulged, which may make it necessary for the Safety of the State, in some particular Circumstances, to restrain some Persons from their Liberty for a certain time, and that the King, who is entirely entrusted with the Management of State-Affairs, shall be presumed always to act for the Publick Good; and that it is immodest for any of his Courts to question the Justice of his Proceedings of this kind, which the Law seems wholly to have left to his Wisdom, or to suffer a Suggestion that he abuses his Prerogative to cover Oppression; and that the Subject is in no danger of perpetual Imprisonment on this Account, for that the Court of King's Bench hath always used a discretionary Power over such Commitments, as well as all others, and therefore upon special Circumstances of Hardship, may admit Persons under such Commitments to Bail; but that where there was nothing extraordinary in the Case, it had been the general Course of the Court not to do it without a special Order from the Council for it, as appeared

Vide Supra Sect 36.

[a] Vide Supra Sect. 66.
[b] S. P. C. 72, 73. F. N. B. 66. E.

Rushworth's Collections, part 1. fol. 510.

appeared from the Examination of moſt of the Precedents relating to this Matter. And therefore in the Caſe abovementioned the Court of King's Bench was unanimous in Opinion, That Sir *John Corbet*, and the other Gentlemen ſo committed by the King's Special Command, as is abovementioned, had no Right, *prima facie*, to demand the Benefit of Bail, without the Conſent of the Council, and therefore remanded them.

1 Ro. Rep. 219. See the Arguments abovementioned, pag 81.

Sect. 68. But this Matter being afterwards conſidered in Parliament, and it being the general Opinion, That the chief Reaſon why thoſe Gentlemen incurred the King's Diſpleaſure was their Refuſal to pay the Loans, which, as they inſiſted, were demanded of them without ſufficient Authority; and it being evident, That if there were no certain legal Remedy for the Liberty of the Subject againſt ſuch a Strain of the Prerogative, no Man could be ſafe in maintaining his Property, either in Parliament, or out of it, againſt a diſputed Demand from the Crown, but would be liable to a diſcretionary Impriſonment, and that under colour of Law, without any certain Redreſs from the Law; it was thought neceſſary on this Occaſion to draw up the famous Petition of Right, which was afterwards aſſented to by the King, wherein, among other things, the Lords and Commons complain to the King, *That againſt the Tenour of of the above* cited Statutes, divers Subjects had then of late been impriſoned, without any Cauſe ſhewed; and when for their Deliverance they had been brought before Juſtices by Writs of* Habeas Corpus, *there to undergo and receive as the Court ſhould order; and their Keepers commanded to certify the Cauſes of their Detainer, no Cauſe had been certified, but that they were detained by his Majeſty's ſpecial Command, ſignified by the Lords of his Privy Council, and yet were returned back to ſeveral Priſons, without being charged with any thing to which they might make Anſwer according to the Law: And thereupon the ſaid Lords and Commons, among other things, humbly pray, That no Freeman, in any ſuch manner as is before mentioned, be impriſoned, or detained,* &c.

Ruſhworths Collections 1 part, 428, 473, 499, &c.

Ruſhworth's Collections, Part 1. Fol. 613.

* Supra Section. 66.

Sect. 69. And it ſeems to have been generally agreed, ſince the time of this Petition, That where-ever any Commitment by the Privy Council hath not expreſſed, with ſome convenient Certainty, the Crime alledged againſt the Party, he ought to be bailed upon his *Habeas Corpus*.

Vide Cro. Car. 507, 579, 593.

Sect. 70. And for the greater Security of the Liberty of the Subject, againſt Commitments by the Command of the King, or of his Privy Council, it is farther *provided and enacted*, by 16 *Car.* 1. *cap.* 10. *Par.* 8. *That if any Perſon ſhall be committed, reſtrained of his Liberty, or ſuffer Impriſonment by the Command or Warrant of the King's Majeſty, in his own Perſon, or by the Command or Warrant of the Council-Board, or of any of the Lords or others of his Majeſty's Privy Council; That in every ſuch Caſe, every ſuch Perſon upon* Demand *or Motion to the Judges of the King's Bench or Common Pleas, in open Court, ſhall without Delay, upon any Pretence whatſoever, for the ordinary Fees uſually paid for the ſame, have forthwith granted unto him a Writ of* Habeas Corpus, *to be directed generally unto all and every Sheriffs, Gaoler, Miniſter, Officer, or other Perſon in whoſe Cuſtody the Party committed or reſtrained ſhall be, and ſuch Sheriff,* &c. *ſhall, at the return of the ſaid Writ, and according to the Command thereof, on due and convenient Notice thereof given unto him, at the Charge of the Party who requireth or procureth ſuch Writ, and on Security by his own Bond given, to pay the Charges of carrying back the Priſoner, if he ſhall be remanded by the Court,* &c. *which Charges ſhall be ordered by the Court, bring or cauſe to be brought the Body of the Party before the Judges of the Court, from whence the ſame Writ ſhall iſſue, in open Court, and ſhall then likewiſe certify the true Cauſe of ſuch his Detainer or Impriſonment, and thereupon*

[a] See 1 Syd. 78.
1 Keb. 305 pl. 15, 17.

the Court, within three Court-Days after such Return made and delivered [a] *in open Court, shall proceed to examine and determine whether the Cause of such Commitment, appearing upon the said Return, be just and legal or not, and shall thereupon do what to Justice shall appertain, either by delivering, bailing, or remanding the Prisoner: And if any thing shall be otherwise wilfully done, or omitted to be done by any Judge, Justice, Officer, or other Person aforementioned, contrary to the true meaning hereof, That then such Person so offending shall forfeit to the Party grieved, his treble Damages,* &c.

Sect. 71. But it is provided Par. 9. *That the above-recited Clause shall extend only to the Warrants and Directions of the Council-Board, and to the Commitments, Restraints and Imprisonments of any Person or Persons, made, commanded or awarded, by the King's Majesty, his Heirs or Successors, in their own Person, or by the Lords and others of the Privy Council, and every one of them.*

Sect. 72. As to the second Particular, *viz.* Where Bail is grantable by the Court of King's Bench, to a Person imprisoned by either House of Parliament, There can be no Doubt but that the highest Regard is to be paid to all the Proceedings of either of those Houses, and that where-ever the Contrary does not plainly and expressly appear, it shall be presumed that they act within their Jurisdiction, and agreeably to the Usages of Parliament, and the Rules of Law and Justice: And therefore, where-ever it stands indifferent upon the Return of a *Habeas Corpus*, whether a Commitment by either of those Houses were strictly legal or not, and the Parliament be still sitting, I can find no Precedent that the Prisoner hath been bailed by the Court of King's Bench. And it cannot but be expected, that those Houses would be apt to resent an Attempt of this kind, which might seem to carry with it an implicit Reflection on their Honour, as unjustly depriving a Subject of his Liberty, and putting him under a Necessity of demanding Justice from another Court, by unreasonably refusing to restore him to it; which surely shall never be intended, where their Proceedings are capable of a more favourable Construction. And therefore in the Lord *Shaftbury*'s Case, who, upon his *Habeas Corpus* in the King's Bench was returned to have been committed by the House of Lords for his high Contempt committed against that House, the Court would not take notice of any Exceptions against the Form of the Commitment, as that it was too general, and did not express the Nature of the Contempt, or in what Place it was committed, *&c.* for that it shall be presumed, That it was such for which the Lords might lawfully make such an Order, and no other Court shall prescribe to them in what Form they ought to make it. But if it be demanded, in case a Subject should be committed by either of those Houses, for a Matter manifestly out of their Jurisdiction, what remedy can he have? I answer, That it cannot well be imagined that the Law, which favours nothing more than the Liberty of the Subject, should give us a Remedy against Commitments by the King himself, appearing to be illegal, and yet give us no manner of Redress against a Commitment by our fellow Subjects, equally appearing to be unwarranted. But as this is a Case, which, I am perswaded, will never happen, it seems needless over nicely to examine it.

1 Mod. 144, 145.

Sect. 73. However it seems agreed, That a Person committed for a Contempt, by the Order of either House of Parliament, may be discharged by the Court of King's Bench after a Dissolution, or Prorogation of the Parliament, whether he were committed during the Sessions, or afterwards; for that all the Orders of Parliament are determined by a Dissolution,

Diſſolution, or Prorogation; and all Matters, before either Houſe, muſt be commenced anew at the next Parliament, except only in the Caſe of a Writ of Error: And if the Subject ſhould be deprived of his Liberty till the next Parliament, which perhaps may not meet again in many Years, no one could ſay when his Impriſonment would end. 1 Keb. 871, 887, 888. 1 Syd. 245. 1 Lev. 165. 1 Mod. 155, 157.

Sect. 74. But it is holden in *Shower's Reports*, That a Lord committed by the Houſe of Lords, on an Impeachment of Treaſon, and afterwards pardoned, cannot be diſcharged by the Court of King's Bench, becauſe the Impeachment being in a Superior Court, the Pardon muſt be pleaded there; and the Commitment being by the Lords, the King's Bench cannot take Conuſance of it. Yet it ſeems to have been taken for granted in the Lord *Stafford*'s Caſe, That the Court of King's Bench may, in their Diſcretion, bail a Lord upon an Impeachment of High Treaſon, which in that Caſe they refuſed to do, not as a Matter out of their Power, but as a thing which they were not bound to do, and improper on Conſideration of the whole Circumſtances. And though the Reaſons above cited from *Shower's Reports*, ſeem proper to prove, That the Court of King's Bench cannot diſcharge a Priſoner from any Impeachment in Parliament whatſoever; yet they ſeem by no means to prove, that they cannot bail him. But it is obſervable, That it doth not clearly appear, from either of the above mentioned Reports, whether any Parliament were ſitting at the Time of the Motions for ſuch Diſcharge and Bailment, or not; but it is certainly moſt likely to prevail in ſuch a Motion, when no Parliament is ſitting, nor likely ſoon to ſit, and after the Party hath been long in Priſon; becauſe, in ſuch a Caſe, if he ſhould not be bailed, he might be perpetually impriſoned for a Crime, without any Opportunity of making his Defence. Shower's, 100. Raymond, 381.

Sect. 75. As to the third Particular, *viz.* Where Bail is grantable by the King's Bench, to a Perſon committed by the Court of Chancery; little is ſaid in the Books, except in the Reign of King *James* the firſt, at the time when Sir *Edward Coke* was Chief Juſtice, when this Matter was very much litigated, and occaſion'd great Heats between the two Courts, and ſeveral Perſons committed to the *Fleet* by the Chancellor, were bailed by the Court of King's Bench, upon Exceptions to the Generality of the Form of the Commitments, as [a] not ſhewing the time of the Commitment, or ſetting [b] forth only the Command of the Lord Chancellor as the Ground of the Impriſonment, without mentioning any Crime at all, or mentioning the Crime in [c] general Terms, as for a Contempt to the Court of Chancery, without ſhewing what the Contempt was, or at what time committed: And one [d] *Glanvil*, who was generally committed by the command of the Lord Chancellor, without ſetting forth any Cauſe of ſuch Command, ſeems to have been bailed upon Examination of the Merits of the Decree, for diſobeying whereof he was in truth committed; whereby it appeared that the Decree related to a Matter before adjudged at the Common Law, which was thought contrary to the Purport of the [f] Statutes of 27 *Ed.* 3. 1. & 4 *H.* 4. 23. But this Proceeding being reſented by the Lord Chancellor, the ſaid *Glanvil* was afterwards recommitted by him for the ſame Matter, and yet was afterwards, on another *Habeas Corpus*, bailed the ſecond time by the Court of King's Bench: But I have not met with any Precedent of this kind of late Years; and how far the long Diſuſe of ſuch like Proceedings may have leſſened the Authority of the Caſes above mentioned, may deſerve to be conſidered. However, it cannot but be expected, That,

[a] 1 Rol. Rep. 192, pl. 32, 218, pl. 19.
[b] Moor. 839.
[c] 1 Rol. Rep. 219, pl. 21. 1 Rol. Rep. 192, pl. 31, 32. 218, pl. 19, 20. 219, pl. 23.
[d] 1 Rol. Rep. 111, 219. Moor, 838. 2 Bulſt. 301. Cro. Jac. 343. like Caſe 3 Bulſt. 115. 1 Rol. Rep. 277.
[f] Vide 1 Rol. Rep. 277. 3 Bulſt. 115. Daliſon. 81. 3 Leon. 18.

That the Superior Courts will pay the higheſt Regard to one anothers Proceedings, and be ready to preſume, That they are agreeable to Law, unleſs the Contrary appear, or the Caſe be very particular and extraordinary, which may perhaps reaſonably induce them, in ſome Circumſtances, to make Exceptions from thoſe general Rules, which in common Caſes uſually govern their Diſcretion. But what Caſe in particular may be ſaid to be of ſo extraordinary a Nature, it would be needleſs and preſumptuous for me to endeavour to examine. But as to the Caſe above mentioned, which was formerly ſo much litigated, concerning the Chancery's giving Relief againſt a judgment of Law, ſince it ſeems to be ſettled at this Day, That the Chancery may, in ſome Caſes, give Relief againſt the unequitable Uſe of ſuch a Judgment, eſpecially as to a Point not relievable by Law; whenever it ſtands indifferent, whether the Matter examined by Chancery, after a Judgment at Law, be of ſuch a Nature as is proper for Relief in Chancery, or not; it is not probable, That any other Court of *Weſtminſter-Hall* will eaſily preſume that it is not, when the Chancellor, who is the proper Judge, hath determined that it is: And agreeably hereto it hath been adjudged, That a Commitment from Chancery, for Diſobedience to a Decree, is good, without ſhewing what the Decree was.

Vaughan, 130, 140. Seems contrary.

Vide Book 1. Ch. 19. Sect. 17.

1 Mod. 155. Moor, 840. pl. 1133.

Sect. 76. As to the fourth Particular, *viz.* Where Bail is grantable by the Court of King's Bench to one committed by an Inferior Court of Record; it ſeems, That this Court, having the ſupreme Controul of all inferior Courts, may, in Diſcretion, on Conſideration of the whole Circumſtances of any Caſe whatſoever, bail any Perſon who ſhall appear to have been unjuſtly or hardly deprived of his Liberty by any Inferior Court. And therefore, where-ever it ſhall clearly and expreſsly appear, that a Perſon hath been committed by any ſuch Court, for a Matter which either is in Truth no Crime at all, or, if it be a Crime, is not within the Juriſdiction of ſuch Court, there can be no Doubt but that it is a proper Motion to the King's Bench to bail him. But in what other Caſes in particular one may hope for the like Succeſs in a Motion of this kind it ſeems difficult to determine; for that every ſuch Caſe depends upon its particular Circumſtances, which have great Weight with the Court in its Determinations of this kind, in which it is in great meaſure left to its Diſcretion. And therefore, tho' perhaps it may bail a Man on a Commitment by a Mayor of a Town, or a Juſtice of Peace, or other inferior Magiſtrate, for a Contempt, without ſhewing the particular Nature of it; yet it cannot be expected, that it will with like readineſs bail a Man on ſuch a general Commitment by a Court of a higher [a] Dignity, as a Court of Oyer and Terminer, or any other Court of *Weſtminſter-Hall*; to the Honour of whoſe Proceedings the greateſt Regard is always to be given; and on this ground chiefly, as I ſuppoſe, where a Perſon on a *Habeas Corpus*, was returned to have been committed by an Order of the Exchequer, for not paying a Fine of 50*l.* by the Eccleſiaſtical Commiſſioners impoſed upon him, the Court of King's Bench [b] refuſed to bail him, though it was not ſhewn wherefore the ſaid Fine was impoſed. And as a great Regard is always paid to the Dignity of the Court by which the Party is committed; ſo is it likewiſe to the Notoriety of the Offence; and therefore, where a Perſon convicted of buying and ſelling old Money, before Juſtices of Oyer and Terminer, was committed in Execution for the Fine, by an Order of the Court, not ſtrictly formal, yet the Court of King's Bench refuſed [c] to bail him, for this Reaſon chiefly, becauſe he was in execution, and his Commitment

2 Bulſt. 139, 140.

[a] See the precedent Section, and Cro. Jac. 219. & Vaughan 139, 140.

[b] Cro. Car. 579.

[c] 1 Sid. 144, 286, 320.

ment was defective only in point of Form. Alſo where Perſons taken in Execution for their Fines to the King, ſet on them by a Seſſions of Juſtices of Peace, have not only brought their *Habeas Corpus*, but alſo their Writ of Error in the King's Bench, and aſſigned Errors, yet the Court has refuſed to bail them. But I take it for granted, in thoſe Caſes which are but briefly reported, That it appeared upon the whole Record, That ſuch Fines were legally impoſed. Alſo it ſeems, That the ſaid Court has ſometimes been induced to deny Perſons committed by other Courts, by Warrants not ſtrictly formal, the Benefit of Bail, for the Enormity, dangerous Tendency, or Obſtinacy [a] of their Offence, which if it had been attended with leſs aggravating Circumſtances might not have excluded them from it. Alſo the ſaid Court, in determining whether it be proper to bail a Man committed by another Court, uſually conſiders all the other Circumſtances of the Caſe, as the Length [b] and Hardſhip [c] of the Impriſonment, and ſuch like, in order to give ſuch a Determination upon the whole, as may be moſt agreeable to the Honour and Prerogative of the Crown, and the Liberty and Safety of the Subject.

Salk. 348. 5 Mod. 19, 20, &c. Vide March, 52, 53. 1 Sid. 288. 289. 1 Sid. 320. pl. 10. 144.

[a] 1 Bulſt. from 48. to 54. 1 Rol. Rep. 220, pl. 14. 337, pl. 52. 411, pl. 54. [b] 1 Rol. Rep. 218. pl. 19. 337. pl. 51. 2 Bulſt. 140. [c] Latch. 12.

Sect. 77. But it ſeems to be agreed, That no one can in any Caſe controvert the Truth of the Return to a *Habeas Corpus*, or plead or ſuggeſt any Matter repugnant to it: Yet it hath been holden, That a Man may confeſs and avoid ſuch a Return, by admitting the Truth of the Matters contained in it, and ſuggeſting others not repugnant, which take off the effect of them. And upon this Ground, where one *Swallow*, a Citizen of *London*, was committed for refuſing to accept the Office of an Alderman of the ſaid City to which he had been elected, and the Cuſtom of the City juſtifying a Commitment for ſuch a Refuſal, and the Election and Refuſal were ſet forth in the Return to the *Habeas Corpus*; he filed a ſuggeſtion in the Crown-Office, That he was an Officer of the King's Mint, and that all ſuch Officers were exempted from all City Offices, both by Preſcription and by the King's Charter; and thereupon the Patent of the Grant of his Office, and alſo the Patent of the Exemption being inrolled in the Court, he was diſcharged.

1 Sid. 287, 288.

Sect. 78. Alſo the Court will ſometimes examine by Affidavit, the Circumſtances of a Fact on which a Priſoner brought before them by an *Habeas Corpus* hath been indicted, in order to inform themſelves, on Examination of the whole Matter, whether it be reaſonable to bail him or not. And agreeably hereto, where one *Jackſon*, who had been indicted of Piracy before the Seſſions of Admiralty, on a malicious Proſecution, brought his *Habeas Corpus* in the ſaid Court in order to be bailed, the Court examined the whole Circumſtances of the Fact by Affidavits, upon which it appeared, That the Proſecutor himſelf, if any one, was Guilty, and carry'd on the preſent Proſecution to skreen himſelf; and thereupon the Court, in Conſideration of the Unreaſonableneſs of the Proſecution, and the Uncertainty of the Time when another Seſſions of Admiralty might be holden, admitted the ſaid *Jackſon* to bail, and committed the Proſecutor till he ſhould find Bail to anſwer the Facts contained in the Affidavits.

5 Mod 323. 454, 455. 2 Jo. 222. Trin. 4 Georg.

Sect. 79. As to the fifth Particular, *viz.* Where Bail is grantable by the Court of King's Bench, to one excluded by the above-mentioned Statute of *Weſtminſter* 1. *chap.* 15. from the common Benefit of a Replevin by the Sheriff; It cannot be doubted, but that notwithſtanding neither [d] the Judges of this, nor of any other Superior Court of Juſtice, are ſtrictly within

[d] 2 Inſt. 185, 186, 189. H P. C. 104. Salk. 61.

within the Purview of that Statute; yet [a] they will always, in their Discretion, pay a due Regard to the Rules preſcribed by it, and not admit a Perſon to Bail who is expreſsly declared by it to be irrepleviſable, without ſome particular Circumſtance in his favour: And therefore it ſeems difficult to find an Inſtance where Perſons attainted [b] of Felony, or but convicted thereof by Verdict general or [c] ſpecial, or notoriouſly [d] guilty of Treaſon or Manſlaughter, *&c.* by their own Confeſſion or otherwiſe, have been admitted to the Benefit of Bail, without ſome ſpecial Motive to induce the Court to grant it: As where [e] a Perſon taken by a *Capias utlagatum*, on an Appeal of Felony by the Name of *J. S.* Gentleman, pleads that his Name is *J. S.* Yeoman, and not Gentleman, and ſo he is not the ſame Perſon who was outlawed, in which Caſe the Court in Diſcretion may bail him; for untill the Plea be determined, it appears not whether he were the Perſon intended or not. Or where [f] a Perſon outlawed alledges an Error in the Record, in which Caſe alſo the Court, *ex gratia*, may bail him, eſpecially if the Error be apparent. Or where a Man is convicted [g] of Felony, upon Evidence by which it plainly appears to the Court that he is not guilty of it; in which Caſe even the Juſtices of Gaol-Delivery may bail him. Or where [h] it appears to the Court that the Proſecutor of an Indictment, or the Plaintiff in an Appeal, hath unreaſonably delayed his Proſecution; as where two *Nihils* are returned upon two Writs of *Scire facias*, awarded againſt a Plaintiff in an Appeal, removed by *Certiorari* into the King's Bench, and the Priſoner hath lain a long time under Confinement. Or where [i] the Defendant in an Appeal hath pleaded an Excommunication in Diſability of the Plaintiff; in which caſe it is apparent, That the Plaintiff cannot proceed at preſent; and if the Defendant ſhould be kept in Priſon till the Plaintiff be abſolved, he might be a Priſoner for Life. Or where [k] it appears to the Court, That the Defendant may be in danger of loſing his Life, either by Famine, or a dangerous Diſtemper, *&c.* if he continue longer in Priſon.

As to the ſecond Point, *viz.* In what Caſes Bail is grantable by the other Courts of *Weſtminſter-Hall*: I ſhall conſider,

1. How far it is grantable by ſuch Courts, to Perſons committed for Cauſes under the Degree of Treaſon or Felony.
2. How far to Perſons committed for Treaſon or Felony.

Sect. 80. As to the firſt Point, *viz.* How far Bail is grantable by the ſaid Courts, to Perſons committed for Cauſes under the Degree of Treaſon or Felony, it ſeems, [l] That the Courts of Common Pleas and Exchequer, at any time during Term, and the Court of Chancery, either in Term or Vacation, may award a *Habeas Corpus* by the Common Law, for any Perſon committed for any ſuch Cauſe, and thereupon diſcharge him, if it ſhall clearly appear by the Return, That the Commitment was againſt Law (as being made by one who had no Juriſdiction of the Cauſe, or for a Matter for which by Law no Man ought to be puniſhed) or bail him, if it ſhall be doubtful whether the Commitment were legal or not, *&c.* However it is certain at this Day, That by force of the *Habeas Corpus* Act, Par. 3. & 10. ſet forth more at large *Sect.* 17. & 22. any of the ſaid Courts, in Term-time, and any Judge of either Bench, or Baron of the Exchequer, being of the Degree of the Coif, in the Vacation,

[a] 3 Bulſt. 113. 1 Rol. Rep. 168. Supra. Sect. 33. Latch. 12. S. P. C. 74, 75. 5 Mod. 454, 455.
[b] Kelyng. 90.
[c] Dyer. 179. pl. 42. 1 Bulſt. 87, 88.
[d] 1 Rol. Rep. 268. 3 Bulſt. 113, 114. Vide Supra Sect. 33.
[e] 5 H. 7. 16. pl. 7. 2 Inſt. 188. H. P. C. 101. S. P. C. 74. Letter A
[f] 19 H. 6. 2. a. S. P. C. 74. Letter A. 2. Inſt. 188. 1 Syd. 316.
[g] Crompton's Juſtice, 154. pl. 22
[h] 5 Mod. 454. 455. 1 Sid. 78. 1 Bulſt. 85. Palm. 558, 559. 1 Keb. 305. 306. 48 Ed. 3. 22. a.
[i] 3 Aſſ. pl. 12. 13 Ed. 4, 8. pl. 3. Bro. Mainpriſe, 48. 73. S. P. C. 72. Letter B.
[k] Latch 12. Cro. Jac. 356. Co. Lit. 289. a.
[l] 2 Inſt. 53, 55. 615. 4 Inſt. 290. Vaughan, 154, 155, 156, 157. 2. And 297. Daliſon, 81. 3 Leon. 18. 2 Jo. 13, 14, 17. 2 Mod. 198. 306.

ion, may award a *Habeas Corpus* for any Priſoner whatſoever, who is bailable by the Intent of that Act, and thereupon bail him.

Sect. 81. As to the ſecond Point, *viz.* How far Bail is grantable by the ſaid Courts to Perſons committed for Treaſon or Felony, it is obſervable, That the above-mentioned Clauſes of the ſaid *Habeas Corpus* Act extend not to Perſons committed for Treaſon or Felony, plainly and ſpecially expreſſed in the Warrant of Commitment; neither do I find any printed Caſe, wherein Perſons committed for ſuch Crimes have been bailed either by the Courts of Common Pleas or Exchequer. However it is certain, That in ſome Caſes Perſons committed for Felony are bailable by the Court of Chancery. But our Law-Books being generally ſilent in relation to theſe Matters, I ſhall refer the Reader for the more accurate Knowledge of them, to Obſervation and Experience.

See Vaughan 156, 157. 2 Jo. 14. Regiſter, 271. a. b

Sect. 82. As to the ſeventh general Point of this Chapter, *viz.* In what Form Bail is to be taken; it ſeems to be the Practice of the Court of King's Bench in admitting a Perſon to Bail, who is actually preſent [a] in Court, upon an Indictment or Appeal [b] of Felony, or other Crime, puniſhable with loſs [c] of Member, to take [d] a ſeveral Recogniſance to the King in a certain Sum from each of the Bail, that the Priſoner ſhall appear at a certain Day, *&c.* and alſo, That the Bail ſhall be liable for the Default of ſuch Appearance, *&c.* Body for Body. And [e] it ſeems to be left to the Diſcretion of Juſtices of Peace, in admitting any Perſon to Bail for Felony, to take the Recogniſance either in a certain Sum, or elſe Body for Body. But [f] where a Perſon is bailed by the Court of King's Bench, before the Return of a *Capias* awarded againſt him for Felony, or (as it ſeems to be implied in the Book cited in the Margin that he may be,) or by any Court for a Crime of an Inferior Nature, it ſeems, That the Recogniſance ought to be only in a certain Sum of Money, and not Body for Body. However it is certain [g] at this Day, That Perſons bound Body for Body, are not liable on the forfeiture of the Recogniſance, to ſuch Puniſhment to which the Principal is to be adjudged, if found Guilty, but only to be fined, *&c.*

[a] 1 Bulſt. 45. [b] 2 Jon. 210. [c] 1 Lev. 106. Contra 1 Sid. 211. [d] 4 Inſt. 178. 1 Bulſt 45. [e] 21 H. 7. 20. pl. 3. Con. 1 Syd. 210. [f] Vide 2 Jo. 222. [g] H. P. C. 97. Crompt. Juſtice 335. a. 4 Inſt. 178. Dalt. cap 127. *ſeems contrary.* [f] 1 Bulſt. 45. [g] 4 Inſt. 178. S. P. C. 65. Fitz Mainpriſe, 13. 21 H. 7. 20. Pl 3. H. P. C. 97. Contra Fitz. Mainpriſe. 12. [h] Dalt. cap. 127. S. P. L. 77. Letter C. 4 Inſt. 178. [i] S. P. C. 77. c. [k] 2 Inſt. 150. 4 Inſt. 178. [l] Dalt. cap. 127.

Sect. 83. As to the eighth general Point of this Chapter, *viz.* What ſhall forfeit the Recogniſance: If on a bailment for Felony, the uſual [h] Form, *ad Standum recto de felonia prædicta, et ad reſpondendum Domino Regi*, be made uſe of, and at the Trial the Party ſtand obſtinately mute, it may reaſonably be argued, that in Strictneſs the Recogniſance is forfeited, for [i] that the Expreſſions above-mentioned ſeem to import at leaſt thus much, That the Priſoner ſhall make ſome Anſwer; and at the Common Law, before the Statute [k] of *Marlebridge chap.* 28. if a Perſon under Bail had inſiſted on his Privilege as a Clerk, and refuſed to anſwer to the Crime alledged againſt him, his Sureties were to be amerced; and though the ſaid Statute have in that Caſe excuſed the Bail, yet an obſtinate Refuſal to anſwer in other Caſes may perhaps remain as it was at the Common Law. Mr. *Dalton* [l] indeed ſeems to be of another Opinion, becauſe the Words above-mentioned are always uſed of Courſe: But it ſeems ſtrange, That Words ſhould be looked on as idle and inſignificant becauſe they are moſt uſual and proper. However, if late Practice and Experience have been agreeable to the above-mentioned Opinion of Mr. *Dalton*, as I apprehend that they have, they will certainly be of great Force to maintain it: And indeed it muſt be confeſſed, That if a Man's Bail, who are his Gaolers of his own chooſing, do as effectually ſecure his Appearance, and put him as much under the Power of the Court as if he had been in the Cuſtody of the proper Officer, they ſeem

to

to have anſwered the end of the Law, and to have done all that can be reaſonably required of them: But howſoever the Law may ſtand in relation to this Caſe, it is certain, That if Perſons be bound by Recogniſance, that *J. S.* ſhall appear in the King's Bench the firſt Day of ſuch a Term, to anſwer to ſuch an Information againſt him, and not depart till he ſhall be diſcharged by the Court, and afterwards the Attorney General enter a *Nolle proſequi* as to that Information, and exhibit another, on which the Defendant is convicted, and refuſes to appear in Court after perſonal Notice, the Recogniſance is forfeited; for being expreſs that the Party ſhall not depart till he be diſcharged by the Court, it cannot be ſatisfy'd unleſs he be forth-coming, and ready to anſwer to any other Information exhibited againſt him whilſt he continues not diſcharged, as much as to that which he was particularly bound to anſwer to. But in ſuch Caſe it ſeems, That the Recogniſance ſhall not be forfeited by the Party's not appearing in Court the firſt Day of every Term, after he hath pleaded to the Information, as it may be before he hath pleaded.

Queen and Redpath, 11 Ann.

CHAP. XVI.

Of Commitments.

AND now I am to conſider in what Caſes, and in what Manner, Offenders are to be committed, for the better Underſtanding whereof, I ſhall examine,

1. What kinds of Offenders are to be committed.
2. By whom.
3. To what Priſon.
4. What is to be done previous to their Commitment.
5. What ought to be the Form of it.
6. At whoſe Charges they are to be ſent to Priſon.
7. To what Court the Commitment is to be certified.
8. By what means the Party may be diſcharged from ſuch Commitment.

Sect. 1. As to the firſt Point, There is no Doubt but that Perſons apprehended for Offences which are not bailable; and alſo all Perſons who neglect to offer Bail for Offences which are bailable, muſt be committed.

Sect. 2. And it is ſaid, That whereſoever a Juſtice of Peace is impowered by any Statute to bind a Perſon over, or to cauſe him to do a certain thing, and ſuch Perſon being in his Preſence ſhall refuſe to be bound, or to do ſuch thing, the Juſtice may commit him to the Gaol, to remain there till he ſhall comply.

Sect. 3. As to the ſecond Point, *viz.* by whom ſuch Perſons are to be committed, it ſeems to be agreed by all the Old [a] Books, That whereſoever a Conſtable, or private Perſon, may juſtify the arreſting another for a Felony or Treaſon, he may alſo juſtify the ſending or bringing

[a] 10 H. 4. 7. a. 7 Ed. 4. 20. a. 3 Ed. 4. 26. b. 27. a. 20 Ed. 4. 6. b. 10 Ed. 4. 17. b 18. a. 5 H. 7. 4. b. 5 a. 2 H. 7. 3. b. 11 Ed. 4. 4. b.

bringing him to the common Gaol, and that every Private Person has as much Authority in cases of this kind as the Sheriff, or any other Officer, and may justify such Imprisonment by his [a] own Authority, but not by the Command of another. But [b] inasmuch as it is certain, That a Person lawfully making such an Arrest may justify bringing the Party to the Constable, in order to be carried by him before a Justice of Peace; and inasmuch as the Statutes of 1 & 2 *Ph. & M.* 13. and 2 & 3 *Ph. & M.* 10. which direct in what manner Persons brought before a Justice of Peace for Felony shall be examined by him in order to their being committed or bailed, seem clearly to suppose, That all such Persons are to be brought before such Justice for such purpose; and inasmuch as the Statute of 31 *Car.* 2. commonly called the *Habeas Corpus* Act, seems to suppose, That all Persons who are committed to Prison, are there detained by Vertue of some Warrant in Writing, which seems to be intended of a Commitment by some Magistrate; and the constant Tenour of the late Books, Practice and Opinions, are agreeable hereto: It is certainly most advisable at this Day, for any Private Person who arrests another for Felony, to cause him to be brought as soon as conveniently he may, before some Justice of Peace, that he may be committed or bailed by him.

[a] 5 H. 7. 4. b. 5. a. Fitz. False Imprif. 8.
[b] 9 Ed. 4. 26. b. 27. a. 16 Ed. 4. 17. b. H. P. C. 91, 112.
H. P. C. 91, 112. Dalt. cap. 118.

Sect. 4. But it is certain, [c] That the Privy Council, or any one or two of them, or a Secretary of State, may lawfully commit Persons for Treason, and for other Offences against the State, as in all Ages they have done.

[c] 1 And 298. Palm. 558. 1 Sid. 78. 1 Leon. 70, 71. Sir William Wyndham's Case, Trin. 2 Georg. Sal. 347.

As to the third Point, *viz.* To what Prison such Offenders are to be committed, I shall observe,

1. That the Prison ought to be in the Realm of *England*.
2. That regularly it ought to be a Common Prison.

Sect. 5. As to the first of these Particulars, it is enacted by 31 *Car.* 2. 12. *That no Subject of this Realm, being an Inhabitant, or Resiant of this Kingdom of* England, *Dominion of* Wales, *or Town of* Berwick upon Tweed, *shall or may be sent Prisoner into* Scotland, Ireland, Jersey, Guernsey, Tangier, *or into Parts, Garrisons, Islands, or Places beyond the Seas, which then were, or at any time hereafter should be, within or without the Dominions of his Majesty, his Heirs or Successors; and that every such Imprisonment is by the said Statute enacted and adjudged to be illegal, and that every Subject so imprisoned, shall have an Action of False Imprisonment,* &c. *and recover treble Costs, and no less Damages than five Hundred Pounds against the Person making such Warrant, who shall also incur a* Præmunire.

Sect. 6. As to the second of the above-mentioned Particulars, It is enacted by 14 *Ed.* 3. 10. as followeth, *In the right of the Gaols which were wont to be in ward of the Sheriffs, and annexed to their Bailiwicks; it is assented and accorded, That they shall be rejoined to the Sheriffs, and the Sheriffs shall have the Custody of the same Gaols, as before this time they were wont to have; and they shall put in such Under-keepers for whom they will answer.* And this is confirmed by 19 *H.* 7. *chap.* 10. Also it is recited by 5 *H.* 4. 10. *That divers Constables of Castles, within the Realm, being assigned Justices of Peace by the King's Commission, had by colour of such Commission, used to take People to whom they bore evil Will, and imprison them within the said Castles, till they had made Fine and Ransom with the said Constables for their Deliverance.* And thereupon it is enacted, *That none be imprisoned by any Justice of*

the Peace, but only in the Common Gaol; saving to Lords and others which have Gaols their Franchiſe in this Caſe.

Sect. 7. And it [a] ſeems, That the King's Grant ſince this Statute to private Perſons to have the Cuſtody of Priſoners committed by Juſtices of Peace, is void. And it is ſaid, That none can claim a Priſon as a Franchiſe, unleſs he have alſo a Gaol-delivery.

Sect. 8. It ſeems to be [b] agreed, That if a Perſon be arreſted in one County, for a Crime done in it, and fly into another, and be re-taken there, he may be brought before a Juſtice of the County where the Offence was done, and be committed by him to the Gaol of ſuch County. But it ſeems to be the ſtronger [c] Opinion, That if one who hath committed an Offence in one County, fly into another before he be taken, and be purſued and arreſted in ſuch County, he ought to be brought before a Juſtice of the County where he is taken, and be committed by him to the common Gaol of the ſame County, [d] whether it lie in ſuch County or another; [e] unleſs there be ſome ſpecial Reaſon to the Contrary, as an apparent Danger that the Party may be reſcued from ſuch Priſon by Rebels, *&c.* And it ſeems to be laid down as a Rule, by ſome Books, [f] That any Offender may be committed to the Gaol next to the Place where he was taken, whether it lie in the ſame County or not.

Sect. 9. It is [g] ſaid, That if a Conſtable bring a Felon to Gaol, and the Gaoler refuſe to receive him, the Town where he is Conſtable ought to keep him till the next Gaol-Delivery. But [h] in other Caſes it ſeems, That regularly no one can juſtify the detaining a Priſoner in Cuſtody out of the common Gaol, unleſs there be ſome particular Reaſon for ſo doing; as if the Party be ſo dangerouſly [i] ſick that it would apparently hazard his Life to ſend him to the Gaol, [k] or there be evident Danger of a Reſcous from Rebels, *&c.* Yet conſtant Practice ſeems to authoriſe a Commitment to a Meſſenger; and it is [l] ſaid, That it ſhall be intended to have been made in order for the carrying of the Party to Gaol.

Sect. 10. As Priſoners ought to be committed at firſt to the proper Priſon, ſo ought they not to be removed from thence, except in ſome ſpecial Caſes. And to this Purpoſe it is enacted by 31 *Car.* 2. *chap.* 2. Par. 9. *That if any Subject of this Realm, ſhall be committed to any Priſon, or in Cuſtody of any Officer or Officers whatſoever, for any criminal, or ſuppoſed criminal Matter; that the ſaid Perſon ſhall not be removed from the ſaid Priſon and Cuſtody, into the Cuſtody of any other Officer or Officers, unleſs it be by* Habeas Corpus, *or ſome other legal Writ; or where the Priſoner is delivered to the Conſtable, or other inferiour Officer, to carry ſuch Priſoner to ſome common Gaol; or where any Perſon is ſent by Order of any Judge of Aſſiſe, or Juſtice of the Peace, to any common Workhouſe, or Houſe of Correction; or where the Priſoner is removed from one Priſon or Place to another, within the ſame County, in order to a Trial, or Diſcharge by due Courſe of Law; or in caſe of ſudden Fire, or Infection, or other Neceſſity; upon Pain that he who makes out ſigns or counterſigns, or obeys or executes ſuch Warrant, ſhall forfeit to the Party grieved one Hundred Pounds for the firſt Offence, two Hundred Pounds for the ſecond,* &c.

Sect. 11. As to the fourth Point, *viz.* What ought to be done previous to the Commitment of ſuch Offenders, it is enacted by 2 *&* 3 *Ph. & M.* 10. *That every Juſtice or Juſtices, before whom any Perſon ſhall be brought for Manſlaughter, or Felony, or for Suſpicion thereof, before he or they ſhall commit or ſend ſuch Priſoner to Ward, ſhall take the Examination of ſuch Priſoner, and Information of thoſe that bring him, of the Fact and Circumſtances thereof; and the ſame, or as much thereof as ſhall be material to prove the Felony,* ſhall

[a] See 1 And. 345. Cro. El. 829, 830. 9 Co. 119. b. Sal. 343.
[b] H. P. C. 93. Dalt. cap. 118. Cromp. 172, b. 173, a.
[c] Dalt. cap. 118. Crompt. 72, b. H. P. C. 92. 93. 11 Ed. 4. 4, b. 5, a. 13 Ed. 4. 8, b. 9, a. Pl. Com. 37, a. Keilw. 45, b. Contra 2 Bulſt. 264. 11 Ed. 4. 7. a. b.
[d] Keilw. 45, b. 11 Ed. 4. 5, a
[e] 11 Ed. 4. 4, b. 5, a. 7, a. b.
[f] Keilw. 45, b. 22 Ed. 4. 34, b.
[g] H. P. C. 114. 10 H. 4. 7. pl. 2. Fitz. Eſcape, 8. Dalt. cap. 118. Bro. faux. Impriſonment. 25.
[h] 20 Ed. 4. 6, b. Bro. faux. Impriſonment. 21, 27. 11 Ed. 4. 7. a. b.
[i] 2 Ed. 4. 8. b
[k] 11 Ed. 4. 4, b. 5, a.
[l] Sal. 347.

ſhall put in writing within two Days after the ſaid Examination, and the ſame ſhall certify in ſuch Manner and Form, and at ſuch Time, as they ſhould and ought to do, if ſuch Priſoner, ſo committed or ſent to Ward, had been bailed, or let to Mainprize, upon ſuch Pain as in 1 & 2 Ph. & M. 13. *is limited and appointed, for not taking or not certifying ſuch Examinations,* &c. *And it is farther enacted, That the ſaid Juſtices ſhall have Authority to bind all ſuch by Recogniſance or Obligation, as do declare any thing material to prove the ſaid Manſlaughter, or Felony, to appear at the next General Gaol-Delivery to be holden within the County, City, or Town Corporate, where the Trial of the ſaid Manſlaughter, or Felony, ſhall be, then and there to give Evidence againſt the Party; and that the ſaid Juſtices ſhall certify the ſaid Bonds taken before them, in like manner as they ought to certify the Bonds mentioned in the ſaid former Act,* &c. See Chap. 15. Sect. 60.

Sect. 12. It ſeems that a Juſtice of Peace ought not to detain a Priſoner by Vertue of this Statute, in order to examine him, any longer than is neceſſary for ſuch Purpoſe, for which it is ſaid, That the ſpace of three Days is a reaſonable time. Cro. E. 829, 830.

As to the fifth Point, *viz.* What ought to be the Form of a Commitment, the following Rules are to be obſerved.

Sect. 13. 1. It muſt be in Writing, under the Hand and Seal of the Perſon by whom it is made, and expreſſing his Office, or Authority, and the Time and Place at which it is made, and muſt be directed to the Gaoler, or the Keeper of the Priſon. 2 Inſt. 52, 591. Dalt. cap 125. H. P. C. 94.

Sect. 14. 2. It may be made either in the Name of the King, and only teſted by the Perſon who makes it, or it may be made by ſuch Perſon in his own Name. Dalt. cap. 125.

Sect. 15. 3. It may command the [a] Gaoler to keep the Party in ſafe and cloſe Cuſtody; for if every Gaoler be bound [b] by the Law to keep his Priſoner in ſuch Cuſtody, ſurely it can be no fault in a *Mittimus* to command him ſo to do. [a] Sir William Wyndham's Caſe, Trin. 2. Georg. [b] 8 Co. 100. 9 Co 87, b.

Sect. 16. 4. It ought to ſet forth the Crime alledged againſt the Party with convenient [c] Certainty, whether the Commitment be by the Privy [d] Council, or any other Authority; otherwiſe the Officer [e] is not puniſhable, by reaſon of ſuch *Mittimus*, for ſuffering the Party to eſcape: And the Court, before whom he is removed by *Habeas Corpus*, ought to diſcharge or bail him: And this doth not only hold where [f] no Cauſe at all is expreſſed in the Commitment, but alſo where it it ſo looſely ſet forth, that the Court cannot adjudge whether it were a reaſonable Ground of Impriſonment; as [g] where one was committed for manifold Contumacy to the High Commiſſion-Court, or for [h] refuſing to anſwer before them to certain Articles, or [i] for inſolent Behaviour and Words ſpoken at the Council-Table, *&c.* And it is holden by Sir [k] *Edward Coke*, in his ſecond Inſtitute, That a Commitment for High Treaſon, or Felony in general, without ſhewing the Species of the Offence, is not good; yet in [l] another part of the ſame Book, ſuch general Commitments ſeem to be allowed by him to be good: And there are Precedents of Commitments for Felony in general, in good [m] Authors. And [n] it hath been reſolved, That Commitments for High Treaſon in general are good. [c] H. P. C. 94. Dalt. cap 125. 2 Inſt. 52, 591. [d] 16 Car. 1. cap. 10. Cro. Car. 133, 507, 579, 593. 2 And 298, Contra 1 Ro. Re. 134. 1 Leon. 71. Ch. 15. Sect. 66, to 72. [e] 2 Inſt. 591. H. P. C. 109. Infra. cap. 17. Palm. 558. [f] Cro. Car. 579, 793, 507. Barkham's Caſe. Palmer, 558. [g] 1 Rol. Rep. 245. [h] 1 Rol. Rep. 220, 245. [i] Cro. Car. 133, 579. 2 Buſt. 139, 140. [k] 2 Inſt. 591. 5 Mod. 85. [l] 2 Inſt. 52. [m] Crompt. 233, b. Dalt. cap. 125. 1 And 298. 1 Keb. 305. Palmer, 558. Sir William Wyndham's Caſe, Trin. 2 Georg. [n] 1 Sid. 78.

Sect. 15.

Sect. 17. 5. It is safe to set forth, That the Party is charged upon Oath; but this is not necessary, for it hath been [a] resolved, That a Commitment for Treason, or for Suspicion of it, without setting forth any particular Accusation, or Ground of the Suspicion, is good.

Sect. 18. 6. Every such *Mittimus* ought to have a lawful Conclusion, [b] *viz.* That the Party be safely kept till he be delivered by Law, or by order of Law, or by due Course of Law; or that he be kept till farther [c] Order, (which shall be intended of the Order of Law) or to the like Effect. And if the Party be committed only for want of Bail, it seems [d] to be a good Conclusion of the Commitment, That he be kept till he find Bail. But a Commitment, [e] till the Person who makes it shall take further Order, seems not to be good. And it seems, That the Party committed by such, or any other irregular *Mittimus*, may be bailed.

Sect. 19. As to the sixth Point, *viz.* At whose Charge Offenders are to be sent to Prison, it is enacted by 3 *Jac.* 1. 10. *That every Person and Persons, that shall be committed to the common or usual Gaol within any County or Liberty within this Realm, by any Justice or Justices of the Peace, for any Offence or Misdemeanour, having Means or Ability thereunto, shall bear their own reasonable Charges, for so conveying or sending them to the said Gaol, and the Charges also of such as shall be appointed to guard them to such Gaol, and shall so guard them thither. And if any such Person or Persons so to be committed, shall refuse at the time of their Commitment and sending to the said Gaol, to defray the said Charges, or shall not then pay or bear the same, that then such Justice or Justices of the Peace, shall and may by Writing under his or their Hand and Seal, or Hands and Seals, give Warrant to the Constable or Constables of the Hundred, or Constable or Tythingman of the Tything, or Township where such Person or Persons shall be dwelling and inhabit, or from whence he or they shall be committed, or where he or they shall have any Goods within the County or Liberty, to sell such, and so much of the Goods and Chattels of the said Persons, as by the Discretion of the said Justice, or Justices of the Peace, shall satisfy and pay the Charges of such his or their conveying or sending to the said Gaol; the Appraisement to be made by four of the honest Inhabitants of the Parish or Tything where such Goods or Chattels shall remain and be, and the Overplus of the Money which shall be made thereof, to be delivered to the Party to whom the said Goods shall belong.*

Sect. 20. And it is farther enacted, *That if the said Persons shall not have, or be known to have, any Goods or Chattels, which may be sold for the Purpose aforesaid, within the County or Liberty, an indifferent Assessment shall be made by the Constables and Church-Wardens, and two or three other the honest Inhabitants of the Parish, or Tything, where such Offenders shall be taken or apprehended, the said Taxation being allowed under the Hand of one or more Justice or Justices of the Peace, if there be such Constables or Church-Wardens there inhabiting; and in default of them, by four of the principal Inhabitants of the said Parish, Township or Tything, where such Offenders shall be taken or apprehended: And if any so assessed shall refuse to pay their said Taxation, then the Justice or Justices of Peace by whom the said Offenders shall be committed to Prison, or any Justice of Peace near adjoining, shall and may give Warrant as aforesaid, to the Constable, Tythingman, or other Officer there, to distrain the Goods of any so assessed, which shall refuse to pay the same, and to sell the same; and that such Person or Persons so authorised, shall have full Power so to distrain, and by Appraisment of four substantial Inhabitants of the said Place, to sell a sufficient Quantity of the Goods and Chattels of the said Person so refusing, for the levying of the said Taxation; and if any Overplus of the Money come by the Sale thereof, the same to be delivered to the Owner.*

Sect.

[a] Sir William Wyndham's Case, Trin. 2 Geor. Dalt. cap. 125. Cromp. 233. b.
2 Inst. 52. Palm. 558, 559.
[b] 2 Inst. 52, 591. H. P. C. 94. Crompt. 233. b. Dalt. cap. 124.
[c] 1 Lev. 230 contra Cro. Car. 558.
[d] 6 Mod. 73, 74.
[e] 2 Inst. 52, 591. 1 Rol. Rep. 220. 1 Lev. 230. Cro. Car. 579. con. 3 Bulst. 48, 49. 1 Rol. Rep. 410.

Sect. 21. As to the ſeventh Point, *viz.* To what Court ſuch Commitments are to be certified, it is enacted by 3 *H.* 7. 3. *That every Sheriff, Bailiff of Franchiſe, and every other Perſon, having Authority or Power of keeping of Gaol, or of Priſoners for Felony, do certify the Names of every ſuch Priſoner in their keeping, and of every Priſoner to them committed for any ſuch Cauſe, at the next general Gaol-Delivery, in every County or Franchiſe where any ſuch Gaol ſhall be, there to be Calender'd before the Juſtices of the Deliverance of the ſame Gaol, whereby they may, as well, for the King as for the Party, proceed to make Deliverance of ſuch Priſoners according to Law, on pain to forfeit to the King for every Default there recorded, one hundred Shillings.*

Sect. 22. As to the eighth Point, *viz.* By what means a Perſon under ſuch a Commitment may be diſcharged, It ſeems, That a Perſon legally committed for a Crime, certainly appearing to have been done by ſome one or other, cannot be lawfully diſcharged by any one but by the King, till he be acquitted on his Trial, or have an *Ignoramus* found by the Grand Jury, or none to proſecute him, on a Proclamation for that purpoſe by the Juſtices of Gaol-Delivery. But if a Perſon be committed on a bare Suſpicion, without any Appeal or Indictment, for a ſuppoſed Crime, where afterwards it appears that there was none, as for the Murder of a Perſon thought to be dead, who afterwards is found to be alive; it hath been holden, That he may be ſafely diſmiſſed without any farther Proceeding, for that he who ſuffers him to eſcape is properly puniſhable only as an Acceſſary to his ſuppoſed Offence; and it is impoſſible that there ſhould be an Acceſſary where there can be no Principal; and it would be hard to puniſh one for a Contempt, in diſregarding a Commitment founded on a Suſpicion, appearing in ſo unconteſted a Manner to be groundleſs.

Keilw. 34. 3 Inſt. 209, 210. H. P. C. 94, 95.

Keilw. 34. H. P. C. 109, 110, 114.

CHAP. XVII.

Of Hindrances in bringing Offenders to publick Juſtice, &c.

HAVING ſhewn in what Manner Criminals are to be arreſted, bailed or committed, I am now to conſider in what Manner they and their Aſſiſtants are puniſhable for an Hindrance in bringing them to publick Juſtice. And in order hereto I ſhall examine,

1. How far they are puniſhable for an Offence of this kind, before an Arreſt made.
2. How far after an Arreſt.

[a] H. P. C. 116.
[b] S. P. C. 31. Letter B. Crompt. 38. b. 26 Aſſ. 47. Fitz. Juſtice of Peace. 114, 231. Contra H. P. C. 116. Fitz. Coron. 333. 2 Inſt. 590.

Sect. 1. As to the firſt Point, It is [a] certainly an Offence of a very high Nature, to oppoſe one who lawfully endeavours to arreſt another for Treaſon, or Felony. And ſome [b] have ſaid, That the Perſon who ſo oppoſes an Arreſt for Treaſon, whereof he knows the Party to have been guilty, is thereby guilty of the Treaſon; and that he who ſo oppoſes an Arreſt for Felony, is an Acceſſory to the Felony. And if it be a ge-

a general [a] Rule, That whoever knowing a Person to have committed any such Crime receives and comforts him, and endeavours to favour and aid him in the making his Escape, thereby becomes a Principal in the Case of Treason, and an Accessory in the Case of Felony, though he use no Force in giving such Assistance to the Offender; it seems strange that he who so far takes part with him as to fight in his Defence from Justice, should not be at least equally guilty. And therefore it seems reasonable to understand the Books above cited, which seem to contradict this Opinion, to intend no more than that it is not Felony in the Party himself, who is attacked in order to be arrested, to save himself from the Arrest by such Resistance.

[a] H. P. C. 218. 219. 2 Inst. 183. Moore, 8. pl. 29. S. P. C. 41. Letter E.

Sect. 2. [b] But if a Person, knowing another to have been guilty of such a Crime, barely receive him, and permit him to escape, without giving him any manner of Advice, Assistance or Encouragement in it, as by directing him how to do it in the safest manner, or furnishing him with Money, Provisions, or other Necessaries, it seems he is guilty of a high Misdemeanour only, but no capital Offence.

[b] S. P. L. 32. Letter I. 9 H. 4. 1. Pl 3. 26 Ass. 47.

Sect. 3. Also it is certain, That the Party himself who flies from such an Arrest, is not thereby guilty of a capital Offence, but only liable to forfeit his Goods, when such Flight is found against him, in such manner as hath been already shewn, *Chap.* 9. *Sect.* 51. and shall be also more fully considered hereafter.

H. P. C. 111, 271.

Sect. 4. How far a Vill, which suffers one who has been guilty of Homicide to escape, is liable to be amerced, hath been already shewn, *Chap.* 12. *Sect.* 2, 3.

Offences of this kind, after an Arrest made, may be considered in relation either,

1. To the Party under such an Arrest. Or,
2. To others.

Such Offences by the Party himself are either without or with Force.

Sect. 5. And first, As to such Offences by the Party himself, without Force, which seem properly to come under the Notion of Escapes, there is little remarkable in the Books; and therefore I shall content my self with taking notice, That as all Persons are bound to submit themselves to the Judgment of the Law, and to be ready to be justified by it; whoever, in any Case, refuses to undergo that Imprisonment which the Law thinks fit to put upon him, and frees himself from it by any Artifice, before such time as he is delivered by due Course of Law, is guilty of a high Contempt, punishable with Fine and Imprisonment. And if it be so great a Crime for one not arrested to fly, in order to save himself from Imprisonment for a capital Offence, surely it must be at least as great a Crime, for one who is actually under the Custody of the Law for any such Crime, by any indirect means to free himself from it. And some [c] have holden, That such an Escape amounts to Felony: But this Opinion seems to be over severe, and not to be maintained by the [d] Book cited to prove it.

H. P. C. 108. 2 Inst. 589, 590.

Cro Car. 210.

1 Ass. pl. 6.

[c] S. P. C. 31. Letter A.

[d] 2 Ed. 3. 2. pl. 4. Firz. Coron. 149.

CHAP.

CHAP. XVIII.

Of breaking Priſon.

SUCH Offences by the Party himſelf, accompanied with Force, come under the Notion of Priſon-breaches; which I ſhall conſider,

1. As they ſtand by the Common Law.
2. On the Statute *de frangentibus Priſonam*, which was made in the firſt Year of King *Edward* 2.

Sect. 1. And firſt as to Priſon-breaches, as they ſtood by the Common Law; it ſeems the better Opinion, [a] That all ſuch Offences were Felonies, if the Party were lawfully in Priſon for any Cauſe whatſoever, whether Criminal or Civil, and whether he were actually in the Walls of a Priſon, or only in the Stocks, or in the Cuſtody of any Perſon who had lawfully arreſted him; and it ſeems not to have been any way material whether the Priſon did belong to the King, or to the Lord of a Franchiſe; not only for that every Perſon who is under a lawful Impriſonment, may properly enough be called the King's Priſoner; but alſo becauſe it is allowed, [b] That whoever breaks from any ſuch Impriſonment, ſince the Statute *de frangentibus Priſonam*, is guilty of Felony: From whence it ſeems clearly to follow, That he muſt have been in like manner guilty before that Statute, the Purport whereof is not to make any Offences Felonies which were not ſo before, but only to reſtrain ſome of thoſe which were. And it [c] ſeems alſo to be clear, That the Confeſſion of ſuch Offence before the Coroner is not traverſable by the Common Law; which is not altered as to this Point by the Statute.

[a] Bracton, Lib. 3. ch. 9. Briton, fol. 17. S. P. C. 30. 2 Inſt. 589. H. P. C. 87. Contra S. P. C. 31. Letter D. 33. Letter H. 1 H. 7. 6. pl. 2. Bro. Coron. 130. Cro. Car. 210. 2 Inſt. 589.

[b] Vide infra. Sect. 4.

[c] Vide Supra Ch. 9. Sect. 49.

Sect. 2. And now I am to conſider theſe Offences, as they ſtand by the ſaid Statute, for the better underſtanding whereof I ſhall firſt ſet down the Words of the Statute, and then endeavour to ſhew in what Manner they are to be underſtood.

Sect. 3. And firſt, the Words of the Statute are as follows, *De priſonariis priſonam frangentibus, Dominus Rex vult & præcipit, quod nullus de cætero, qui priſonam fregerit, ſubeat judicium vitæ vel membrorum pro fractione priſonæ tantum, niſi cauſa, pro qua captus & impriſonatus fuerit, tale judicium requirat, ſi de illa ſecundum legem & conſuetudinem terræ fuiſſet convictus, licet temporibus præteritis aliter fieri conſuevit.* For the better underſtanding of the Conſtruction whereof, I ſhall conſider the following Points,

2 Inſt. 589.

1. What ſhall be ſaid to be a Priſon, within the meaning of this Statute.
2. How far the Impriſonment ought to be well grounded.
3. What ſhall be ſaid to be a breaking of Priſon.
4. For what Crime the Party ought to be impriſoned, to make the Offence of breaking the Priſon Felony, within the Intent of the Statute.

5. Whether

5. Whether the Offence of breaking Priſon can ever amount to High Treaſon.

6. At what Time, and in what Manner, the Offender is to be proceeded againſt.

7. In what Manner he is to be indicted.

8. In what Manner thoſe are to be puniſhed for a Breach of Priſon, who are within the Benefit of the Statute.

Sect. 4. As to the firſt Point, *viz.* What ſhall be ſaid to be a Priſon [a] within the meaning of the Statute; it ſeems clear, That any Place whatſoever, wherein a Perſon under a lawful Arreſt for a ſuppoſed Crime, is reſtrained of his Liberty, whether in the Stocks or Street, or in the common Gaol, or the Houſe of a Conſtable or private Perſon, or the Priſon of the Ordinary, is properly a Priſon within the Statute; for Impriſonment [b] is nothing elſe but a Reſtraint of Liberty.

Sect. 5. As to the ſecond Point, *viz.* How far the Impriſonment ought to be well grounded, it is clear, [c] That if a Perſon be taken upon a *Capias*, awarded on an Indictment or Appeal againſt him, for a ſuppoſed Treaſon, or Felony, he is within the Statute if he break the Priſon, whether any ſuch Crime were in Truth committed by him or any other Perſon, or not; for that there is an Accuſation againſt him on Record, which makes his Commitment lawful be he never ſo innocent, and the Proſecution never ſo groundleſs.

Sect. 6. Alſo if an Innocent Perſon be committed by a lawful *Mittimus* on ſuch a Suſpicion of a Felony, actually done by ſome other, as will juſtify his Impriſonment, though he be neither indicted nor appealed, he is certainly [d] within the Statute if he break the Priſon, for that he was legally in Cuſtody, and ought to have ſubmitted to it till he had been diſcharged by due courſe of Law.

Sect. 7. But if no [e] Felony at all were done, and the Party be neither indicted nor appealed, it ſeems clear, That no *Mittimus* for ſuch a ſuppoſed Crime will make him guilty within the Statute by breaking the Priſon, for that his Impriſonment was unjuſtifiable.

Sect. Alſo if a Felony were done, yet if there were no juſt Cauſe of Suſpicion, either to arreſt or commit the Party, it ſeems clear, That if his *Mittimus* be not in ſuch Form [f] as the Law requires, his breaking of the Priſon cannot be Felony, becauſe the Lawfulneſs of his Impriſonment in ſuch Caſe depends wholly on the *Mittimus*; which if it be not according to Law, the Impriſonment will have nothing to ſupport it. But if the Party were taken up for ſuch ſtrong [g] Cauſes of Suſpicion as will be a good Juſtification both of his Arreſt and Commitment, but happen to be committed by an informal Warrant, it ſeems, that it may be probably argued, That it will be Felony [h] in him to break the Priſion; for if by the ancient Common Law, any private Perſon might, of his own Authority, juſtify both an Arreſt and Commitment, for Treaſon or Felony, on a reaſonable Cauſe of Suſpicion, as it ſeems probable [i] from the Tenor of all the old Books that he might; and if the Neceſſity of a *Mittimus* [k] from a Magiſtrate, depend rather on the conſtant ſettled Practice of Juſtices of Peace than any direct Law, it ſeems difficult to maintain that a Slip in want of Form of ſuch a *Mittimus*, ſhould make it lawful for the Priſoner to break the Priſon, whereas by the old Law it would have been Felony in ſuch a Caſe to have broken it, without any ſuch *Mittimus* at all. And on the other ſide, if the Party be taken up

[a] Fitz. Coron. 158, 290, 312, 48, 164, 250, 419. 22 Aſſ pl. 85. Cro. Car. 210. 2 Inſt. 589, 590. H. P. C. 107. Dyer 99. pl. 60. Cromp. 38, 39.

[b] S. P. C. 30. D.

[c] 2 Inſt. 590. H. P. C. 109. Bro. Eſcape. 29. See Book 1. Chap. 28. Sect. 11, 12.

[d] H. P. C. 109. 2 Inſt. 590. Dyer 99. pl. 60. Cromp. 38. a.

[e] H. P. C. 109. 2 Inſt. 590. 591. Contra 2 Leon. 166.

[f] Vide Chap. 16. Sect. 12, 13, 14, 15, 16.

[g] Vide Supra Ch. 12. Sect. 8, 9, &c.

[h] Bro. Eſcape. 29. 42 Aſſ. 5.

[i] Vide Supra. Ch. 12 & Ch. 16. Sect. 3.

[k] Vide 5 Mod. 80.

up for ſuch ſlight cauſes of Suſpicion of a Felony actually done, as will not in Strictneſs juſtify the Arreſt, yet if the Juſtice before whom he is brought think them of ſuch Weight as to require a Commitment, and do accordingly ſend the Party to Gaol by a regular *Mittimus*, it ſeems very dangerous for him to break the Priſon; for the Practice of Juſtices of Peace in making ſuch Commitments, being now grown into ſettled Law, it ſeems reaſonable, that their *Mittimus* be a good Juſtification of the Impriſonment which it commands, for a Crime within their Juriſdiction regularly brought before them; from whence it follows, That to break from ſuch Impriſonment muſt be unlawful. And therefore, ſince it doth not appear, that there hath been any direct Reſolution of theſe Points, perhaps it may be reaſonable to underſtand what is more generally ſaid by Sir [a] *Edward Coke*, and Sir [b] *Matthew Hale*, in relation to this Matter, according to the above-mentioned Diſtinctions.

Vide infra, Sect. 14.

[a] 2 Inſt. 591.
[b] H. P. C. 109.

As to the third Point, *viz.* What ſhall be ſaid to be a breaking of Priſon, within the Meaning of this Statute, the following Rules are to be obſerved.

Sect. 8. 1. There muſt be an actual [c] Breaking; for every Indictment for this Offence, as a Felony, muſt have the Words *felonicè fregit priſonam*, which ſeem neceſſarily to import the uſe of ſome real Force or Violence, and not ſuch only as may be implied by the Conſtruction of Law, in any Act done in Contempt of it; and therefore, if without any Obſtruction a Priſoner go out of the Priſon Doors, being opened by the Conſent or Negligence of the Gaoler, or otherwiſe eſcape without uſing any kind of Force or Violence, he is guilty of a Miſdemeanour only, but not of a Felony, and the Gaoler is puniſhable in ſuch manner as ſhall be ſet forth more at large in the next Chapter.

[c] 2 Inſt. 590. H. P. C. 108. S. P. C. 31. Letter A.

[d] Supra Sect. 5.

Sect. 9. 2. Such Breaking muſt be either by the Priſoner himſelf, or by others through his Procurement, or at leaſt with his Privity; for if the Priſon be broken by others, without his Procurement or Conſent, and he eſcape through the Breach ſo made, it ſeems the better [e] Opinion that he cannot be indicted for the Breaking, but only for the Eſcape.

[e] 2 Inſt. 589. H. P. C. 108. S. P. C. 30. Letter E.

Sect. 10. 3. Such Breaking muſt not be neceſſitated by an inevitable Accident, happening without any fault of the Priſoner; as where [f] the Priſon is fired by Lightning, or otherwiſe, without his Privity, and he breaks it open to ſave his Life.

31 Letter B. Fitz. Coron. 48. 1 H. 7. 6. a. [f] 15 H. 7. 1.

Sect. 11. 4. It ſeems, That no Breach of Priſon will amount to Felony, unleſs the Priſoner eſcape; for if the Breaking of a Priſon by a Stranger, in order to free the Priſoners who are in it, be not Felony, unleſs the Priſoners go out of it, as it is ſaid [g] that it is not, it ſeems *a fortiori*, That ſuch a Breach by the Priſoner himſelf, who lies under ſo much ſtronger a Temptation to it, cannot be Felony, unleſs he do eſcape.

2 Pl. Com. 136. 2 Inſt. 590. H. P. C. 108. [g] Keilw. 87. a.

As to the fourth Point, *viz.* For what Crime the Party muſt be impriſoned, to make his breaking the Priſon Felony within the Meaning of the Statute, the following Rules are to be obſerved.

Sect. 12. 1. It is not material, whether the Offence for which he was impriſoned were capital at the time of this Statute, or were made ſo by ſubſequent Statutes; for ſince all Breaches of Priſon were Felonies by the Common Law, which is reſtrained by the Statute in reſpect only

H. P. C. 108.

of Impriſonment for Offences not capital; when an Offence becomes capital, it is as much out of the benefit of the Statute, as if it had always been ſo.

Sect. 13. 2. The Offence for which the Party was impriſoned muſt be a Capital one at the time of the Offence, and not become ſuch by Matter ſubſequent; as where [a] *A.* is committed to Priſon for a dangerous Wound given to *B.* and breaks the Priſon, and then *B.* dies: For though to ſome Intents ſuch Offence be eſteemed capital from the time of the firſt Act, yet inaſmuch as it was in Truth but a Treſpaſs at the time of the breaking of the Priſon, and it was then uncertain whether it would ever become capital; and it becomes ſuch afterwards *ab initio*, by Fiction only, for ſome ſpecial Purpoſes, and Fictions of Law are never carried farther than the Neceſſity of thoſe particular Caſes, which were the Cauſe of the inventing them doth require; they ſhall never be conſtrued to exempt a Perſon from the Advantage of a beneficial Law made in Favour of Life, who is clearly within the Letter, and doth not plainly appear to be out of the Meaning of it. However, it ſeems certain, That ſuch an Offender breaking Priſon, while it is uncertain whether his Offence will become capital, is highly puniſhable for his Contempt, by Fine and Impriſonment, *&c.*

[a] H. P. C. 108, 219. 2 Inſt. 591. Pl. Com 258, b. 401, a. 11 H. 4. 12. b. S. P. C. 33. A.

11 H. 4. 12. b. S. P. C. 35. Letter H.

Sect. 14. 3. If the Party be only arreſted for, and in his *Mittimus* charged with a Crime which does not require judgment of Life or Member, as Petit Larceny, or Homicide *ſe defendendo*, or by Miſadventure, and the Offence, in Truth, be no greater than the *Mittimus* doth ſuppoſe it to be, it is clear, from the expreſs Words of the Statute, That a Breaking of the Priſon cannot amount to Felony. And if the Offence for which the Party is committed, be ſuppoſed in the *Mittimus* to be of ſuch a Nature as requires a capital Judgment, yet if in the Event it be found to be of an inferior Nature, and not to require ſuch a Judgment, it ſeems difficult to maintain, That the Breaking of the Priſon on a Commitment for it can be Felony; for the Words of the Statute are, *Niſi cauſa pro qua captus & impriſonatus fuerit, tale judicium requirit*; and here it appears, That the Offence, which is the Cauſe of his Impriſonment, doth not require ſuch a Judgment; and it is hard to ſay, That a Miſtake of the Nature of the Crime, by the Perſon who makes the Arreſt or *Mittimus*, ſhould ſo far prejudice the Party, as to make his Eſcape amount to Felony by reaſon of ſuch Miſtake, which otherwiſe would have been but a Treſpaſs. Alſo it ſeems to be agreed, That if a Perſon be committed for a ſuppoſed Felony, where no Felony hath been done, he is not guilty of Felony for breaking the Priſon; from whence it clearly appears, That in that Caſe the Law doth not ſo far regard the Charge contained in the *Mittimus*, where there is no good Ground to ſupport it, as in reſpect thereof to exclude the Party from the Benefit of the Statute; and yet in that Caſe the Party is as much accuſed of a capital Offence as in the Caſe in queſtion; ſo that it is clear, That the Law doth not ſo much reſpect the Hainouſneſs of the Charge againſt the Party, as of the very Crime which is the ſubject of the Charge: And this will farther appear if it be conſidered, That the Accuſation cannot be ſaid to be the Cauſe which requires Judgment of Life or Member, but the Offence which ſupports the Accuſation; and if there be no ſuch Offence, there is, in Truth, no Cauſe which requires ſuch a Judgment. On the other ſide, If the Offence, which was the Cauſe of the Commitment, be in Truth of ſuch a Nature as requires a capital Judgment, but in the *Mittimus* be ſuppoſed to be of an inferior Degree; it may probably be argued, That the Party's breaking

H. P. C. 110. 2 Inſt. 590.

ing of the Priſon is Felony within the meaning of the Statute; for the Cauſe of his Arreſt and Commitment is the Fact for which he was arreſted and committed, and that does in Truth require Judgment of Life, though the Nature of it be miſtaken in the *Mittimus*, which does no way alter the Judgment of Law in relation to the Guilt of it. But there appearing no expreſs Reſolution of theſe Points, and the [a] Authors who have expounded this Statute ſeeming rather to incline to a different Opinion, I ſhall leave theſe Matters to the Judgment of the Reader.

[a] 2 Inſt. 590, 591. H P. C. 109, 110.

Sect. 15. 4. It is not material, Whether the Party who breaks his Priſon, were under an Accuſation only, or actually attainted of the Crime charged againſt him; and yet the Words of the Statute are *ſi cauſa talis judicium requirit*: And it cannot be properly ſaid, That the Offence of one attainted doth require ſuch a Judgment, (for that there ought not to be a ſecond Judgment againſt one already condemned) but only that it did require it; and it is a ſettled Rule, that all Statutes are to be conſtrued ſtrictly in Favour of Life, and that no parallel Caſe, which comes within the ſame Miſchief, ſhall be conſtrued to be within the Purview of it, unleſs it can be brought within the Meaning of the Words: Yet conſidering that the manifeſt Purport and Meaning of the Words of the Statute taken all together, is no more than this, That the Breaking of Priſon ſhall not be a capital Offence, unleſs the Crime for which the Party was in Priſon be alſo a capital Offence; and it is frequent, in the Conſtruction of Penal Laws, to bring Perſons within the Purview of them by being within the meaning of the Words, though not in ſtrict Grammar properly within the very Letter; and it would be extreamly harſh to imagine, that the Makers of the Statute could intend a greater Favour to Perſons appearing to be guilty, and actually under the Condemnation of the Law, than to Perſons under an Accuſation only: There can be no Doubt, but that Perſons attainted, breaking Priſon, are as much guilty within the Meaning of the above-mentioned Exception as any others.

S. P. C. 32. Letters A, B, C, D.

See Book 1. Ch. 32. Sect. 2, 3, 4.

Sect. 16. As to the fifth Point, *viz.* Whether the Offence of breaking Priſon can ever amount to High Treaſon; it ſeems clear, That a Perſon committed for High Treaſon becomes guilty of Felony only, and not of High Treaſon, by breaking the Priſon and eſcaping ſingly, without letting out any other Priſoner; for that no Offence is to be conſtrued High Treaſon, which is not either within the Purview of 25 *Ed.* 3. or of ſome ſubſequent Statute relating to Treaſon; but if other Perſons committed alſo for High Treaſon eſcape together with him, and his intention in breaking the Priſon were to favour their Eſcape as well as his own, he ſeems to be guilty of High Treaſon in reſpect of their Eſcape, for that there are no Acceſſories in High Treaſon; and ſuch Aſſiſtance given to Perſons committed for Felony, will make him who gives it an Acceſſory to the Felony, and by the ſame reaſon a Principal in the Caſe of High Treaſon. But this Offence coming more properly under the Notion of Reſcous than of the breaking of Priſon, ſhall be more fully conſidered in the Chapter concerning Reſcous.

Book 1. Ch. 17. Sect. 2. 2 Inſt. 590. S. P. C. 32. Letter F. 1 H. 6. 5. b.

Sect. 17. As to the ſixth Point, *viz.* At what Time and in what Manner the Offender is to be proceeded againſt, it is ſaid, That he may be arraigned for this Offence before he be convicted of the Crime for which he was impriſoned; for that it is not material whether he were guilty of ſuch Crime or not, neither is he puniſhable as an Acceſſory in reſpect thereof, but as a principal Offender in reſpect of the Breach of Priſon

H. P. C. 110, 116. 2 Inſt. 592.

Priſon it ſelf; on which account this Caſe differs from that of a Reſcous or voluntary Eſcape, as ſhall be ſhewn more at large in the following Chapters.

Fitz. Endictment. 30. 1 H. 7. 6. pl. 2.

Sect. 18. It ſeems clear, That the Sheriff's Return of a Breach of Priſon, is not a ſufficient Ground to arraign the Priſoner for it, unleſs he be alſo indicted.

H. P. C. 109. 2 Inſt. 591. Fitz. Endictments, 18.

Sect. 19. As to the ſeventh Point, *viz.* In what Manner an Offender is to be indicted for a Breach of Priſon, it is certain, That every Indictment of this kind, to bring the Offender within the Intention of the Statute, muſt ſpecially ſet forth his Caſe in ſuch a manner that it may appear that he was lawfully in Priſon, and for ſuch a Crime as requires Judgment of Life or Member; and that it is not ſufficient to ſay in general, *Quod felonice fregit priſonam.* And it ſeems, That the ſame Rules which are required for an Indictment of an Eſcape, ſet forth at large in the next Chapter, are generally to be obſerved in Indictments of breaking Priſon.

Book 1. Ch. 20. Sect. 1. Ch. 59 Sect. 1. H. P. C. 116. S. P. C. 35. H. 11 H. 4. 12. b.

Sect. 20. As to the eighth Point, *viz.* In what manner thoſe are to be puniſhed who are within the Benefit of the Statute, by being freed from that ſevere Judgment for the Breach of Priſon, to which by the Common Law they would have been liable: There ſeems to be no Doubt, but that whoever breaks from any lawful Impriſonment is ſtill puniſhable as for a High Miſpriſion by Fine and Impriſonment; for that every capital Offence doth include in it a Miſpriſion, and may be proceeded againſt as ſuch only, if the King pleaſe; and it cannot be thought the Meaning of the Statute in ordaining, That ſuch Offences ſhall not be puniſhed as capital ones, to intend, That they ſhall not be puniſhed at all.

CHAP. XIX.

Of Eſcapes ſuffered by Officers.

HAVING ſhewn in the precedent Chapters, how far the Party himſelf, under a lawful Arreſt for a Crime charged againſt him, is puniſhable for unlawfully freeing himſelf from ſuch Arreſt, without waiting for his Deliverance by due Courſe of Law, I ſhall now in the ſecond Place, conſider Offences of this Kind in Relation to others. And

1. Such as are without Force.
2. Such as are accompanied with Force.

Such Offences, without Force, come under the Notion of Eſcapes, which are either,

1. By Officers. Or,
2. By Private Perſons.

As

As to Escapes suffered by Officers, I shall endeavour to shew the following Particulars.

1. What shall be judged an Escape.
2. Where such Escape is to be esteemed voluntary, and where negligent.
3. Where the Prisoner may be re-taken after an Escape.
4. Whether the Escape is excused by such a Re-taking; or by killing the Prisoner if he cannot be re-taken.
5. In what Manner the Officer suffering an Escape is to be indicted.
6. How an Escape is to be tried and adjudged.
7. How a voluntary Escape is to be punished.
8. How a negligent one.

As to the first Point, *viz.* What shall be adjudged an Escape, the following Rules are to be observed.

Sect. 1. I. There must be an actual Arrest, and therefore, If [a] an Officer, having a Warrant to arrest a Man, see him shut up in a House, and challenge him as his Prisoner, but never actually have him in his Custody, and the Party get free, the Officer cannot be charged with an Escape.

[a] Coron. 76. 9 H. 4. 1. pl. 3. 27 Assiz. pl. 1. Fitz. Coron. 249.

Sect. 2. II. As there must be an actual Arrest, such Arrest must [b] also be justifiable, for if it be either for a supposed Crime, where no such Crime was committed, and the Party neither indicted nor appealed, or for such a slight Suspicion of an actual Crime, aud by such an irregular *Mittimus* as will neither justify the Arrest nor Imprisonment, the Officer is not guilty of an Escape by suffering the Prisoner to go at large: And it seems to be a good general Rule, That where-ever an Imprisonment is so far irregular, that it will be no Offence in the Prisoner to break from it by Force, it can be no Offence in the Officer to suffer him to escape.

[b] Bro. Escape, 22. Fitz. Coron. 224. 42 Ass. pl. 5. Bro. Escape, 27, 29. 5 Mod. 414, 415, 416. Contra 2 Leon. 168. See Ch. 18. Sect. 5, 6, 7, 8.

Sect. 3. III. As the Imprisonment must be justifiable, so must it be also for a Criminal Matter; and some [c] are said to have holden, That no Escape is criminal, but where the Commitment is for Felony. However it is certain, That the Escape of one committed for Petit Larceny [d] only, is criminal; and it seems most agreeable to the general Reason of the Law, That the Escape of a Person committed for any other Crime whatsoever, should also be criminal. For surely, where-ever the publick Justice requires, That a Person be committed for a Crime; it likewise requires, That he be safely kept under such Commitment, and consequently may reasonably demand publick Satisfaction from the Officer to whose Custody he is committed, if he neglect to keep him as he ought.

[c] Fitz. Coro. 248. S. P. C. 33. Letter H.

[d] Fitz. Coro. 430, 431. S. P. C. 33. Letter H.

Sect. 4. IV. As the Imprisonment must be justifiable, and for some Crime, so must its Continuance, at the time of the Escape, be grounded on that Satisfaction which the publick Justice demands from such Crime; for if a Prisoner be acquitted, [e] and detained only for his Fees, it will not be criminal to suffer him to escape, though the Judgment were, That he be discharged paying his Fees; so that till they be paid, the first Imprisonment continued lawful, as before; for inasmuch as he is detained, not as a Criminal, but only as a Debtor, his Escape cannot be more criminal than that of any other Debtor; yet if a Person convicted of a Crime, be condemned to Imprisonment for a certain Time,

[e] Bro. Escape 16. 21 H. 7. 7. S. P. C. 34. Letter F.

See Fitz. Coron. 430. S. P. C. 34. Letter E.

and also till he pay his Fees, and he escape after such time is elapsed, without paying them, perhaps such Escape may be criminal, for that it was part of the Punishment, that the Imprisonment be continued till the Fees should be paid; but it seems, that this is to be intended where the Fees are due to others as well as to the Gaoler, for otherwise the Gaoler will be the only Sufferer by the Escape, and it will be hard to punish him for suffering an Injury to himself only, in the Non-payment of a Debt in his Power to release.

[a] 25 Ed. 3. 39. pl. 22. H. P. C. 113. Fitz. Escape, 4. Fitz. Coron. 246.

Sect. 5. V. It is an Escape, in some Cases, to suffer a Prisoner to have greater Liberty than by the Law he ought to have; as to admit a Person to bail, [a] who by Law ought not to be bailed, but to be kept in close Custody; or to permit [b] a Prisoner to go out of the Limits of the Prison: Yet some [c] seem to have holden, That in this last Case it shall not be adjudged an Escape, unless the Prisoner be found to have had an Intention to escape; but it will be difficult to maintain, That the Offence of the Gaoler can depend on the Intention of the Prisoner.

[b] Fitz. Coron. 242. [c] Fitz. Coro. 431. S. P. C. 133. Letter E.

[d] Fitz. Coro. 236, 400. S. P. C. 33. Letters B. C. Bro. Escape, 14, 32, 49, 52. 10 H. 7 25. b. 26. a. 6 H. 7. 11. b. 12 a

Sect. 6. VI. If [d] the Gaoler so closely pursue the Prisoner, who flies from him, that he re-take him without losing sight of him, the Law looks on the Prisoner so far in his Power all the time, as not to adjudge such a Flight to amount at all to an Escape: But if the Gaoler once lose sight of the Prisoner, and afterwards re-take him, he seems in strictness to be guilty of an Escape; and *à fortiori* therefore, [e] if he kill him in the Pursuit, he is in like manner Guilty, though he never lost sight of him, and could not otherwise take him, not only because the King loses the Benefit he might have had from the Attainder of the Prisoner, by the Forfeiture of his Goods, *&c.* but also because the Publick Justice is not so well satisfied by the killing him in such an extrajudicial Manner.

[e] Fitz. Coro. 328, 346. S. P. C. 33. Letters B. C. See Book 1. Ch. 28. Sect. 11, 12.

Sect. 7. VII. While the Privileges of Sanctuaries were allowed, if a Sheriff, conducting a Prisoner to Gaol, had brought him in the way, through the Limits of such a Franchise, and the Prisoner had claimed the Privilege of it, and by that means got free, it seems, [f] that the Sheriff was guilty of an Escape, for that it was his fault, by bringing his Prisoner that way to Gaol, to give him an Opportunity of claiming the Franchise.

[f] Bro. Escap. 38, 50. 2 H. 4 15. pl. 14. Fitz. Coron. 222, 316. *but* 27 Ass. 54. and Bro. Escape, 24. *seem contrary.*

Sect. 8. VIII. Also while the Law allowed those who had the Benefit of the Clergy, to free themselves from Prison in certain Cases, by making their Purgation before the Ordinary, it was an Escape [g] in the Ordinary, to suffer such Persons to deliver themselves by it, in such Cases in which they ought not to have been admitted to it.

[g] Fitz. Coro. 16. 27 H. 6. 7. b. S. P. C. 33. Letters G. H. Vide 23 H. 8. 11.

Sect. 9. IX. If [h] a Prisoner be rescued by Enemies, the Gaoler is not guilty of an Escape, as he would have been by the better Opinion, if he had been rescued by Subjects, because there is a legal Remedy against them.

[h] Bro. Escap. 10, 32, 52. 6 H 7. 11. b. 12. a. 10 H 7. 25. b. 26. a. 29 Ass. 34. Bro. Escape. 26. seems contrary.

Sect. 10. As to the second Point, *viz.* Where such Escape is to be esteemed voluntary, and where negligent, There [i] can be no Doubt, but that where-ever an Officer, who hath the Custody of a Prisoner, charged with and Guilty of a Capital Offence, doth knowingly give him his Liberty, with an Intent to save him, either from his Trial or Execution, he is guilty of a voluntary Escape, and thereby involv'd in the Guilt of the same Crime of which the Prisoner was guilty, and stood charged with. And it seems to be the Opinion of Sir *Matthew Hale*, [k] That in some Cases an Officer may be adjudged guilty of such Escape, who hath not such Intent, but only means to give his Prisoner that Liberty which

[i] See Cro. Car. 492. S. P. C. 32. Letter I. [k] H. P. C. 113.

which by the Law he hath no Colour of Right to give him; as where a Gaoler bails a Priſoner who is not bailable. But it ſeems agreed, That a Perſon who hath Power to bail, is guilty only of a negligent Eſcape, by bailing one who is not bailable; neither can I meet with any Authority in other Books, to ſupport the above-mentioned Opinion, That the bailing of one who is not bailable, by one who hath no Power to bail, muſt neceſſarily be eſteemed a voluntary Eſcape; but the contrary Opinion ſeems more agreeable to the Purview of 5 *Ed.* 3. 8. ſet forth more at large in the ſubſequent part of this Chapter: Alſo there are ſome Caſes wherein an Officer ſeems to have been found [a] to have knowingly given his Priſoner more Liberty than he ought to have had, as to go out of the Priſon on his Promiſe of returning, or to go among his Friends, to find ſome who would warrant Goods to be his own, which he is ſuſpected to have ſtoln, and yet ſeems to have been only adjudged guilty of a negligent Eſcape. But it muſt be confeſſed, That in theſe Caſes, the Priſoner was only accuſed of Larceny; and it doth not appear, whether he were bailable or not, and generally the old Caſes concerning this Subject, are ſo very briefly reported, that it is very difficult to make an exact ſtate of the Matter from them; however thus much ſeems clear, That if in the Caſes above-mentioned, the Officer were only guilty of a negligent Eſcape, in ſuffering the Priſoner to go out of the Limits of the Priſon, without any Security for his Return, he could not have been guilty in a higher Degree, if he had taken Bail for his Return; from which it ſeems reaſonable to infer, That it cannot be in all Caſes a general Rule, that an Officer is guilty of a voluntary Eſcape by bailing his Priſoner, whom he hath no Power to bail; but that the Judgment to be made of all Offences of this kind, muſt depend on the Circumſtances of the Caſe, as the Heinouſneſs of the Crime with which the Priſoner is charged, the Notoriety of his Guilt, the Improbability of his returning to render himſelf to Juſtice, the Intention of the Officer, the Motives on which he acted, *&c.*

Supra. Sect. 5.

[a] Fitz. Coro. 242, 316, 431. S. P. C. 33.

Sect. 11. Neither is it a certain Rule, That an Officer, who unlawfully, knowingly, and willingly ſuffers a Capital Offender to eſcape, is in all Caſes to be adjudged guilty of a voluntary Eſcape; for where an Ordinary ſuffered a Clerk, attainted, being committed to his Cuſtody, to free himſelf from Impriſonment, by making his Purgation, he might be truly ſaid, to have ſuffered ſuch Priſoner to eſcape unlawfully, knowingly, and willingly, and yet it ſeems, [b] that he was guilty only of a negligent Eſcape, for that he did not ſave the Priſoner from Execution, which was excuſed by the Privilege of the Clergy, but only from the Impriſonment.

[b] Fitz. Coro. 16, 370. Eſcape, 1. S. P. C. 34. G. 141. B. 15 H. 7. 9. pl. 8.

Sect. 12. As to the third Point, *viz.* In what Caſes a Priſoner may be re-taken after an Eſcape; it ſeems to be clearly agreed, by all the Books, [c] That an Officer making a freſh Purſuit after a Priſoner, who hath eſcaped through his Negligence, may re-take him at any time after, whether he find him in the ſame, or in a different [d] County. And it is ſaid generally in ſome Books, [e] That an Officer who hath negligently ſuffered a Priſoner to eſcape, may re-take him where-ever he finds him, without mentioning any freſh Purſuit; and indeed, ſince the Liberty gained by the Priſoner is wholly owing to his own Wrong, there

[c] Fitz. Treſpaſs, 94. Eſcape, 2. Coron. 236. Bro. Eſcape, 49, 32, 52. 13 Ed. 4. 9. 2 Ed. 4. 6. b.

[d] 33 H. 6. 52. b 53. a. 3 Co. 44, b. 52. Bro. Eſcape, 4. Freſh Suit, 3, 5. Contra Keilw. 3. a. Coron. 236, 400, 313, 335. S. P. C. 117. Letter C. Bro. Execution, 58, 151. 27 H. 8. 1. a. F. N. B. 130.

[e] Fitz. Co. 13 H. 7. 1. b.

ſeems

ſeems to be no reaſon he ſhould take any manner of Advantage from it. But where a Gaoler hath voluntarily ſuffered a Priſoner to eſcape, it is ſaid by ſome, [a] That he can no more juſtify the re-taking him, than if he had never had him in Cuſtody before, becauſe by his own free Conſent he hath admitted, that he hath nothing to do with him. And it ſeems to be holden by Sir *William Staundforde*, [b] That after a Gaoler hath been fined for ſuffering a Priſoner negligently to eſcape, he cannot afterwards re-take him; but the Book [c] on which alone he ſeems to ground his Opinion, doth not fully come up to it; for the Purport of it ſeems to be no more than this, That a Gaoler's re-taking of a Priſoner, after he hath been fined for an Eſcape, ſhall be to no purpoſe, for that it is contrary to the Record, by which it appears, that the Priſoner hath been at large; by which it ſeems only to be intended, That a Gaoler, who hath been fined for an Eſcape, ſhall not avoid the Judgment of his Fine by re-taking the Priſoner: But I do not ſee how it can be collected from hence, that he cannot juſtify the re-taking him.

[a] 2 Jon. 21, 22, 45. 3 Co. 52. b. Cro. Jac. 659. Query 1. Danv. Abr. 633. pl. 4. 535. pl. 11.

[b] S. P. C. 33. Letter E.

[c] 13 Eed. 4. 9. Fitz. Eſcape, 2. Bro. Eſcape. 35.

Sect. 13. As to the fourth Point, *viz.* How far an Eſcape is excuſed by re-taking the Priſoner, or by killing him if he cannot be re-taken; perhaps it is the better Opinion, [d] That where-ever a Priſoner, by the Negligence of his Keeper, gets ſo far out of his Power that the Keeper loſes ſight of him, the Keeper is finable at the diſcretion of the Court, notwithſtanding he re-took him immediately after; for it ſeems agreed, That this is to be adjuded a negligent Eſcape, which implies an Offence, and conſequently that it muſt be puniſhable. It is true indeed, That in an Action againſt a Gaoler, for ſuffering one arreſted in a Civil Action to eſcape, it is a good Excuſe for the Gaoler, that before the Action brought, he re took the Priſoner upon freſh Suit, which is well maintained by ſhewing that he purſued him immediately after Notice of the Eſcape, though it were ſome Hours after it, and re-took him; but it does not from hence follow, that the like Excuſe will ſerve for the negligent Eſcape of a Criminal, becauſe this is an Offence againſt the Publick, but the other is only a private Damage to the Party: Neither will it be the like Hardſhip to the Officer, to be expoſed to ſuch Puniſhment as the Court, in diſcretion, ſhall think fit to impoſe upon him for the negligent Eſcape of a Criminal, as it would be to be liable to an Action of Eſcape, for ſuffering a Perſon in his Cuſtody, in a Civil Action, to eſcape; for that in the former Caſe the Court would moderate his Fine according to the Circumſtances of the whole Matter, and would certainly mitigate, if not wholly excuſe it, if he ſhould appear to have taken all reaſonable Care: But in the other Caſe, if he ſhould be liable to an Action, his Judgment would not lie in the diſcretion of the Court, but he would be bound to pay the whole Debt, for which the Party was in his Cuſtody, if the Eſcape ſhould be adjudged againſt him. However it is certain, that it will be no advantage to a Gaoler to re-take his Priſoner, after he has been fined for the Eſcape, as hath been ſhewn in the Precedent Section; alſo it is clear, that he cannot excuſe himſelf by killing a Priſoner in the Purſuit, though he could not poſſibly re-take him; but muſt, in ſuch Caſe, be content to ſubmit to ſuch Fine as his Negligence ſhall appear to deſerve.

[d] S. P. C. 33. H. P. C 114. ſeems contray.

See the Books cited Sect. 6. 1 Rol. Abr. 808. 1 Dan. Abr. 633. pl. 4. Vide 8 Gul. 26. S. 8.

Vide Supra. Sect. 6.

[d] 27 Aſſ. pl. pl. 9. Bro. Eſcape, 22. Fitz. Aſſiſe, 247.

Sect. 14. As to the fifth Point, *viz.* In what Manner the Officer, ſuffering an Eſcape, is to be indicted, it ſeems clear, That every Indictment for an Eſcape, whether negligent or voluntary, muſt expreſsly ſhew, that the Party was actually [d] in the Defendant's Cuſtody for a Crime, Action, or Commitment for it; and that [e] it is not ſuffi-

[e] Salk. 272. 5 Mod. 414, 415.

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cient to ſay, that he was in the Defendant's Cuſtody, and charged with ſuch a Crime; for that a Perſon in Cuſtody may be ſo charged, and yet not be in Cuſtody by reaſon of ſuch Charge: And it ſeems alſo, that every ſuch Indictment muſt expreſsly ſhew that the Priſoner went at large, which is moſt properly [a] expreſſed by the Words *exivit ad largum.* Alſo it ſeems neceſſary, to ſhew the Time when the Offence was committed, for which the Party was in Cuſtody, not only [b] that it may appear, that it was prior to the Eſcape, but alſo [c] that it was ſubſequent to the laſt general Pardon. Alſo it ſeems clear, That every Indictment for a voluntary Eſcape, muſt alledge that the Defendant *felonicè & voluntariè* A. B. *ad largum ire permiſit*; and muſt [d] alſo ſhew the Species of the Crime for which the Party was impriſoned; for it is not ſufficient to ſay in general, That he was in Cuſtody for Felony, *&c.* for that no one can be puniſhed in this Degree, but as involved in the Guilt of the Crime for which the Party was in his Cuſtody; and therefore the particular Crime muſt be ſet forth, that it may appear, that the Principal is attainted for the very ſame Crime, if it were Felony, or that it was in Truth committed, if High Treaſon. But it ſeems queſtionable, [e] whether ſuch Certainty, as to the Nature of the Crime, be neceſſary in an Indictment for a negligent Eſcape, for that it is not material in this Caſe, whether the Perſon who eſcaped were guilty or not.

[a] Bro. Eſcape. 52. 10 H. 7. 26. a.
[b] Contra 2 Leon 166. Bro. Eſcape. 17.
[c] Henly 13.
[d] Cro. El. 752. Hetley, 73. S. P. C. 95. A. H. P. C. 110, 111, 206. 8 Ed. 4. 3. pl. 6.
[e] See Keilw. 192, 194.

Sect. 15. As to the ſixth Point, *viz.* In what manner an Eſcape is to be tried and adjudged, it is to be obſerved, That where Perſons being preſent in a Court of Record, are committed to Priſon by ſuch Court, the Keeper of the Gaol is bound to have them always ready, whenever the Court ſhall demand them of him; and if he ſhall fail to produce them at ſuch Demand, the Court will adjudge him guilty of an Eſcape, without any farther Inquiry, unleſs he have ſome reaſonable Matter to alledge in his Excuſe, as that the Priſon was ſet on Fire, or broken open by Enemies, *&c.* for he ſhall be concluded, [e] by the Record of the Commitment, to deny that the Priſoners were in his Cuſtody: And ſome [f] have holden, That if the Gaoler ſay nothing in Excuſe of ſuch an Eſcape, it ſhall be adjudged voluntary; but I cannot find any Reſolution to this purpoſe; and where it ſtands indifferent, whether an Eſcape be negligent or voluntary, it ſeems difficult to maintain that it ought to be adjudged a Crime of ſo high a Nature, without a previous Trial.

S. P. C. 34, 35. Fitz. Coron. 466.
[e] 11 H. 6. 49. b. 12 H. 6. 2, b. 3. S. P. C. 35.
[f] S. P. C. 34. G. 39 H. 6. 33, 34.

Sect. 16. As to other Priſoners who are not ſo committed, but are in the Cuſtody of a Gaoler, Sheriff, Conſtable, or other Perſon, by any other means whatſoever, it ſeems agreed, [g] That the Perſon who has them in Cuſtody is in no Caſe puniſhable for their Eſcape, except in ſome ſpecial Caſes, untill it be preſented; for the better underſtanding whereof I ſhall endeavour to ſhew,

[g] S. P. C. 35.

1. Before whom ſuch Preſentments are to be made.
2. In what Caſes they are traverſable.

Sect. 17. As to the firſt Point, It is enacted by the Statute of *Weſtminſter* 1. *Chap.* 3. *That nothing be demanded nor taken, nor levied by the Sheriff, nor by any other, for the Eſcape of a Thief, or Felon, until it be judged for an Eſcape by the Juſtices in Eyre; and that he who does otherwiſe, ſhall reſtore to him or them that have paid it, as much as he or they have taken or received, and as much alſo unto the King.*

[a] 27 Aſſ. pl. 1, 9. 21 Aſſ. pl. 12. S. P. C. 35. 2 Inſt. 166.

Sect. 18. It hath been adjudged, [a] That this Statute reſtrains not the Court of King's Bench from receiving ſuch Preſentments, for that its Juriſdiction includes in it that of Juſtices in Eyre, and this Court is it ſelf, the Higheſt Court of Eyre.

Sect. 19. It is farther enacted, by 31 *Ed.* 3. 14. *That the Eſcape of Thieves and Felons, and the Chattels of Felons, and of Fugitives, and alſo Eſcapes of Clerks Convict, out of their Ordinary's Priſon, from thenceforth to be judged before any of the King's Juſtices, ſhall be levied from time to time, as they ſhall fall, as well of the Time paſt as time to come.* By which it ſeems to be implied, That other Juſtices, as well as thoſe in Eyre, may take Cogniſance of Eſcapes; and it is certain, That Juſtices of Gaol-Delivery may puniſh Juſtices of Peace for a negligent Eſcape, in admitting Perſons to Bail, who are not bailable.

Vide Supra Ch. 6. S. 10, 11, 12, 13, 14. S. P. C. 35.

Sect. 20. And it is farther enacted, by 1 *Rich.* 3. *Chap.* 3. *That Juſtices of Peace ſhall have Authority to enquire, in their Seſſions, of all manner of Eſcapes of every Perſon arreſted and impriſoned for Felony.*

S. P. C. 35. Letter F.

Sect. 21. As to the ſecond Particular, in what Caſes ſuch Preſentments are traverſable; It is laid down as a Rule, by Sir *William Staundford*, That where-ever an Eſcape is finable, the Preſentment of it is traverſable; but that where the Offence is amerciable only, there the Preſentment is of it ſelf concluſive; ſuch Amercements being reckoned among thoſe *minima de quibus non curat lex*; and this Diſtinction ſeems to be well warranted by the Old [b] Books; and in what Caſes Eſcapes are finable, and where amerciable only, ſhall be conſidered in the following part of this Chapter, *Sect.* 31, 33, 35.

[b] 21 Aſſ. pl. 12. 27 Aſſ. pl. 9, 27. Fitz. Coron. 291, 328, 345, 346, 352.

Sect. 22. As to the ſeventh Point, *viz.* In what manner a voluntary Eſcape is to be puniſhed, it ſeems to be generally [c] agreed, That ſuch Eſcape amounts to the ſame kind of Crime, and is puniſhable in the ſame degree, as the Offence of which the Party was guilty, and for which he was in Cuſtody, whether it be Treaſon, Felony or Treſpaſs; and whether the Perſon eſcaping were actually committed to ſome Gaol, or under an Arreſt only and not committed; and whether he were attainted, or only accuſed [d] of ſuch Crime, and neither indicted nor appealed; And it is ſaid to be no Excuſe of ſuch Eſcape, that the Priſoner had been acquitted on an Indictment of Death, and only committed till the Year and Day be paſſed, to give the Widow, or Heir of the Deceaſed, an opportunity of bringing their Appeal.

[c] S. P. C. 32. I. H. P. C. 113. Bro. Coron. 112. 27 Aſſ. 62. 11 H. 4. 12. b [d] H. P. C. 114, 115. Dyer 99. pl. 60. Fitz. Eſcape, 3. 27 Aſſ. pl. 62.

Sect. 23. Alſo ſuch an Eſcape, ſuffered by one who wrongfully takes upon him the keeping of a Gaol, ſeems to be [e] puniſhable in the ſame manner as if he were never ſo rightfully intituled to ſuch Cuſtody, for that the Crime is in both Caſes of the very ſame ill Conſequence to the Publick; and there ſeems to be no reaſon that a wrongful Officer ſhould have greater Favour than a rightful, and that for no other reaſon but becauſe he is a wrongful one.

[e] Bro. Eſcape, 18, 23. 2 Ro. Re. 246. Fitz. Aſſiſe, 252. 39 H. 6. 33, 34.

Sect. 24. Alſo if the Warrant of Commitment do plainly and expreſsly charge the Party with Treaſon or Felony, but in ſome other reſpect be not ſtrictly formal, yet it ſeems, that it may [f] be probably argued, that the Gaoler ſuffering an Eſcape, is as much puniſhable as if the Warrant were perfectly right; for it would be highly inconvenient to ſuffer Gaolers to take advantage of a ſlip of this kind in Commitments, which, being generally made by Perſons of no great knowledge in the Law, cannot be expected to be always agreeable to its Forms; and therefore, if they be good in Subſtance, the publick Good ſeems to require, that

Quere 27 Aſſ. pl. 27. H. P. C. 114. [f] Salk. 272, 348. Contra H. P. C. 114. 2 Inſt. 590, 591, 592. Salk. 347. See Ch. 16. & Ch. 18. Sect. 5, 6, 7

that the Gaoler be as much bound to observe them, as if they were never so exactly made.

Sect. 25. But it seems to be agreed, That no Escape can amount to a capital Offence, unless the Cause for which the Party was committed, were actually such at the time of the Escape; and therefore, if a Gaoler suffer one to escape who is committed for having given a dangerous Wound to another, who afterwards dies of such Wound, yet is he not guilty of Felony, for that the Offence of the Prisoner was but a Trespass at the time of the Escape; and though by a Fiction of Law it be afterwards, for some Purposes, esteemed a Felony from the time of the giving of the Wound, yet since it is, in truth, no Felony till the Death of the Party, it shall be afterwards construed such in respect of those only who were privy to the giving of the Wound.

[a] H. P. C. 114. 219. See Ch. 16. Sect. 19. [b] 11 H. 4. 12. b.

Sect. 26. Also it seems clear, That he who suffers another to escape, who was in his Custody for Felony, cannot be arraigned for such Escape as for a Felony, untill the Principal be attainted; for that he who suffers such Escape, is, by the better Opinion, not punishable in this Degree, but as an Accessory to the Felony; and it is a Rule, That no Accessory ought to be tried till the Principal be attainted, as shall be more fully shewn hereafter: Yet it seems certain, [b] that one accused of such an Escape, may be indicted and tried for a Misprision, before the Attainder of the principal Offender, for that whether such Offender were guilty or innocent it was a high Contempt to suffer him to escape: And if the Commitment were for High Treason, and the Person committed actually guilty of it, it seems, that the Escape is immediately punishable as High Treason also, whether the Party escaping be ever convicted of such Crime or not; for that there are no Accessories in High Treason, but all who are guilty of assisting the Party guilty of such Crime, in such a manner as would make them Accessories to a Felony, are accounted Principals in the Treason, as shall be more fully shewn in the Chapter concerning Principal and Accessory.

H. P. C. 110, 215, 216. Fitz. Coron. 158. Query 27 Ass. 62. Contra Crompton, 58. [b] H. P. C. 116. Fitz. Coron. 158. See Ch. 18. Sect. 20. H P. C. 110, seems contrary. H. P. C. 116.

Sect. 27. Also it seems to be clear, That no one is punishable in this degree for a voluntary Escape, but the Person only who is actually guilty of it; and therefore, that the principal Gaoler is only finable for a voluntary Escape suffered by his Deputy, for that no one shall suffer capitally for the Crime of another.

Salkield, 272, H. P. C. 113. 114.

As to the eighth Point, *viz.* in what manner a negligent Escape is to be punished, I shall endeavour to shew,

1. How such Escape is punishable by the Common Law.
2. How by Statute.

Sect. 28. As to the first Particular, I shall take it for granted at this Day, that whoever *de facto* occupies the Office of Gaoler is liable to answer for such an Escape; and that it is no way material whether his Title to the Office be legal or not.

H P. C. 114. 2 Rol. Rep. 146. Bro. Escape, 18, 23.

Sect. 29. Also I take it to be the better Opinion, That [c] a Sheriff is as much liable to answer for an Escape suffer'd by his Bailiff, as if he had actually suffer'd it himself, and that [d] the Court may charge either the Sheriff or Bailiff for such an Escape; and that if a Deputy Gaoler be not sufficient [e] to answer a negligent Escape, his Principal must answer for him: But

Query 27 Ass. 27. Vide Supra. Sect. 23. [c] Fitz. Coron. 327. [d] Salk. 272. H P. C. 113. [e] Levin. 71.

But if the Gaoler who suffers an Escape, have an Estate [a] for Life, or Years, in the Office, I do not find it agreed how far he in Reversion is liable to be punished.

Sect. 30. It seems the better Opinion, That one negligent Escape will not amount to a Forfeiture of the Gaoler's Office, as one voluntary [b] one will; Yet if a Gaoler suffer many negligent Escapes, it is said that he puts it in the Power of the Court to oust him of his Office by its Discretion.

Sect. 31. It seems to be certain, That where-ever a Person is found guilty upon an Indictment, or Presentment, of a negligent Escape of a Criminal actually in his Custody, he ought to be condemned in a certain Sum to be paid to the King, which seems most properly to be called a Fine; but this doth not clearly appear from the Old Books, for in some [c] of them it seems to be taken as a Fine, in others [d] as an Amercement, and in others it is spoken of generally, as an Imposition of a certain Sum, and without any [e] mention either of Fine or Amercement. But where the Books speak of the Punishment of a Vill, or Hundred, for suffering a Felon to escape without being arrested, they seem always to take it as an Amercement, and not as a Fine: And where a Sheriff, having returned a *Cepi Corpus* into the King's Bench, on a *Capias* against a Man on an Indictment of Felony, does not bring him in at the Day, it seems, [f] That he is, by the Course of the said Court, to be amerced, not fined.

Sect. 32. It hath been holden, [g] That a negligent Escape may be pardoned by the King before it happens, but that a voluntary one cannot be so pardoned; but this shall be more fully considered in the Chapter concerning Pardon.

Sect. 33. And it seems, [h] That by the Common Law, the Penalty for suffering the negligent Escape of a Person attainted, was of Course 100*l.* and for suffering such Escape of a Person indicted and not attainted, was 5*l.* [i] but if the Person escaping were neither attainted nor indicted, it seems that it was left to the Discretion of the Court to assess such a reasonable Forfeiture as should seem proper; and [k] if the Party had twice escaped, it seems, that the Penalties above-mentioned were of course to be doubled; yet it seems, that the Forfeiture was to be no greater for suffering [l] a Prisoner, committed on two several Accusations to escape, than if he had been committed but on one.

Sect. 34. As to the second Particular, *viz.* In what manner Offences of this kind are punishable by Statute, it is recited by 5 *Ed.* 3. Ch. 8. *That Persons indicted of Felonies in times past, had removed the Indictments before the King, and there yielded themselves, and by the Marshals of the King's Bench had been incontinently let to Bail, and after had done many evil Deeds,* &c. And thereupon it is enacted, *That such Enditees and Appellees shall be safely and surely kept in Prison, as belongeth to them, according to the Charge which the said Marshals shall have of the Justices; and if any Marshal shall do otherwise, at the Complaint of every Man that will complain, the Justices shall do him Right during the Terms; and in the end of the Terms, upon their rising, the said Marshals shall choose before the said Justices, before they depart their Places, in what Town they will keep such Prisoners, at their Peril: And in the same Town they shall allow to them Houses to keep such Prisoners at their own Costs and Charges; and there they shall keep them in Prison, and shall not suffer them to go wandring abroad, neither by Bail nor without Bail. And if any such Prisoner be found wandring out of Prison, by Bail or without Bail, and that*

[a] 39 H. 6. 33, 34. 2 Rol. A. 155. Letters M. N. 3 Levin. 288. 2 Levin. 81.
[b] Bro. forfeiture of Offices. 27. 2 R. A. 155. Letter N.
[c] 8 H. 5. 2. Fitz. Coron. 84, 292.
[c] S. P. C. 35. H. Bro. Escape, 16. Rastals Ent. 583. b.
[d] Fitz. Coro. 335.
[e] 25 Ed. 3. 39. pl. 22. 27 Ass. pl. 9. S. P. C. 65. 26 Ass. pl. 51. H. P. C. 113 Fitz. Coron. 196, 291, 370. Graunt. 39. Escape, 4. See the Book Supra Ch. 12. Sect. 2.
[f] Fitz. Esch. 7. 40 Ass pl. 42.
[g] 3 H. 7. 15. pl. 30. 8 H. 5. 2. pl. 6. Fitz. Graunt. 37.
[h] S. P. C. 35. K. H. P. C. 113. Fitz Coron. 370.
[i] S. P. C. 35. K. H. P. C. 113. 27 Ass. pl. 9. 40 Ass. pl. 42. 25 Ed. 3. 39. pl. 22. H. P. C. 113. Fitz. Coron. 454.
[k] S. P, C. 33. K. Fitz. Coron. 422.
[l] Fitz. Coro. 196. 26 Ass. pl. 51.

that be found at the King's Suit, or at the Suit of the Party, the Marshals which shall be found thereof guilty, shall have half a Year's Imprisonment, and be ransomed at the King's Will; and the Justices shall thereof make Enquiry when they see time; and as to the Marshals, it shall be done within the Verge that which Reason will. And in case that the Marshals suffer by their Assent such Prisoners to escape, they shall be at the Law, as before the time of the Statute they had been. And the King intendeth not by this Statute to lose the Escape, where he ought to have the same.

Sect. 35. Also it is enacted by 19 H. 7. 10. *That every Sheriff have the Custody of the King's Common Gaols, during the time of his Office, except all Gaols whereof any Person or Persons have the keeping of Estate of Inheritance: And that all Letters Patents made for term of Life, or Years, of the keeping of the said Gaols,* &c. *shall be annulled and void.* And then it is recited by the said Statute, *That divers Persons before that time, for Treason and Felonies had been taken, some for Suspection of the same Deeds, and some upon Indictments, and thereupon brought to the same Gaols, and sometime remained in the keeping of the Persons that so arrested them for the said Causes, and that such Persons, by colour of Negligence, subtilly and craftily, and oftentimes for favour, Mede, Affection or Corruption, suffered the said Offenders to escape, as if it had been by Negligence, to the overt and express Impediment of Justice: And when such Escapes had been found before Justices having Authority to enquire thereof, and thereupon the Parties convicted, or yielded themselves to make Fine for the same, small Fines had been set in those Causes, to the little Dread and Fear, and great Imboldning of the Offenders, by means whereof, great and arrant Felons, and heinous Murderers had escaped,* &c. And thereupon it is enacted, *That for every negligent Escape from any Sheriff, having the keeping of any Gaol, or from any Constable of Castle, or other, being Keeper of any Gaols where such Prisoners accustomably have been, or shall be kept, of Persons indicted of High Treason being in their keeping, that no less Fine be set or made for every such Escape, than* 100 *Marks, and more, by the Discretion of the Justices that shall assess such Fines: And for every Escape of Persons escaping being in their keeping for Suspection of High Treason, no less Fine to be set ne made than* 40 l. *and for every Escape of Persons indicted of Murder, or Petit Treason,* 20 l. *at least, and more, by the Discretion of the Justices that shall assess such Fines: And for every Escape of Persons suspected of Murder or Petit Treason,* 10 l. *or more, by the Discretion of the Justices that shall assess such Fines: And for every Person escaping, being in their keeping, indicted of Felony, other than Murder or Treason,* 10 l. *And for every Person suspected of Felony, other than Murder or Treason,* 100 *Shillings, or more, by the Discretion of the Justices, after the Manner and Quantity of their Demerits, saving to every Person such Right and Title to any such Escapes and Fines for the same, or to be quit of such Escapes, or of any other Escapes, as they had, or ought to have had at the time of the making of the said Act.*

CHAP. XX.

Of Escapes suffered by private Persons.

HAVING in the precedent Chapter endeavoured to shew the nature of Escapes suffered by Officers, I am now in the second Place to consider, the nature of such Escapes suffered by private Persons: But the Law being generally the same in relation to such Escapes, as in relation to those suffered by Officers, I shall refer the Reader, for the general Learning of this kind, to what is said in the former Chapter concerning Escapes suffered by Officers, and shall content my self in this Place with considering the two following Particulars.

H. P. C. 112.

1. Where a private Person is to be adjudged guilty of such an Escape.

2. In what Manner he is to be punished.

Sect. 1. As to the first Point, It seems to be a good general Rule, That where-ever any Person hath another lawfully in his Custody, whether upon an Arrest made by himself or another, he is guilty [a] of an Escape, if he suffer him to go at large, before he hath discharged himself of him by delivering him over to some other who by Law ought to have the Custody of him.

[a] See Ch. 12. H. P. C. 112.

Sect. 2. And therefore, If a private Person arrest another for Suspicion of Felony, and deliver him into the Custody of another private Person, who receives him, and suffers him to go at large, it is said, [b] That both of them are guilty of an Escape, the first, because he should not have parted with him, till he had delivered him into the Hands of a publick Officer; the later, because having charged himself with the Custody of a Prisoner, he ought, at his Peril, to have taken care of him.

[b] H. P. C. 112. 44 Ass. pl. 12. Bro. Escape, 31. 43 Ed. 3. 36. pl. 55. Fitz. Coron. 454

Sect. 3. But if a private Person, having made such an Arrest, have delivered over his Prisoner to the proper Officer (as the Sheriff, [c] or his Bailiff, [d] or a Constable, [e]) from whose Custody the Prisoner escapes, the Party who made the Arrest is not chargeable with it.

Escape, 3. [c] Fitz. Coro. 345. [d] Fitz. Coro. 328, 337. S. P. C. 34. D. [e] H. P. C. 112.

Sect. 4. But if no Officer will receive such Prisoner into his Custody, it seems [f] to be the safest way to deliver him into the Custody of the Township where the Person who arrested him lives, or perhaps of that where the Arrest was made, which shall be bound to keep him till the next Gaol-Delivery; but if such Township refuse also to receive him, I do not see how the Person who made that Arrest can discharge himself of him before the next Gaol-Delivery, unless he can, in the mean time procure him to be bailed.

[f] 10 H. 7. pl. 2. Fitz. Escape, 8. H. P. C. 114.

Sect. 5. Neither can such private Person excuse himself of the Escape of such a Prisoner, by alledging, That he delivered him over to a Sheriff, or other Officer, without shewing to whom, in particular, by Name,

Fitz. Coron. 345.

Name, he ſo delivered him, that the Court may certainly know who is anſwerable for him.

Sect. 6. As to the ſecond Point, *viz.* In what manner a private Perſon is puniſhable for ſuch an Eſcape, I ſhall take it for granted that if it were voluntary, he is puniſhable in the ſame manner as an Officer, for which I ſhall refer the Reader to the former Chapter; and if it were negligent, he is puniſhable by Fine and Impriſonment, at the Diſcretion of the Court, as the Law is ſettled by 19 *H.* 7. 10. The Words whereof, ſo far as they relate to this Purpoſe, are as follows, *And if any Perſon hereafter have any Priſoner in his keeping, arreſted for Suſpection of Felony, Treaſon, or Murder, and that Perſon that is ſo arreſted, eſcape by negligent keeping before that he be brought to the Gaol, that Perſon from whom he ſo eſcaped, ſhall forfeit for every Perſon that doth ſo eſcape, ſuch Fines as ſhall be ſet by the Diſcretion of the Juſtices that ſhall have Authority to aſſeſs ſuch Fines, as the Cauſe ſhall require, and the ſame Forfeiture to go to them that be intituled to have ſuch Forfeitures at the time of making the ſaid Act.*

H. P. C. 112. Bro. Coron. 112. 27 Aſſ. 62.

CHAP. XXI.

Of Reſcous.

THE Offence of a Stranger, in forcibly freeing another from an Arreſt, comes under the notion of Reſcous, which in moſt Inſtances is of the ſame nature with the Offence of breaking Priſon, which hath been already conſidered in the eighteenth Chapter; and therefore it ſeems ſufficient for the Declaration of the Nature of this Crime, to ſhew,

1. In what Caſes it agrees with the Offence of breaking Priſon. And
2. In what it differs.

And firſt, This Offence agrees with that of breaking Priſon in the following Partitulars.

Sect. 1. I. Whatever is ſuch a Priſon, that the Party himſelf was, by the Common Law, guilty of Felony by breaking from it, in every ſuch Caſe a Stranger was guilty of as high a Crime at leaſt, in reſcuing him from it.

2 Inſt. 589. S. P. C. 30, 31. and the Caſes cited Ch. 18. Sect. 1. & 4.

Sect. 2. II. Where-ever [a] the Impriſonment is ſo far groundleſs, or irregular, or for ſuch a Cauſe, or the breaking of it is occaſioned by ſuch a Neceſſity, *&c.* that the Party himſelf breaking the Priſon, is, either by the Common Law, or by the Statute *de frangentibus Priſonam*, ſaved from the Penalty of a capital Offender, a Stranger who reſcues him from ſuch an Impriſonment, is in like manner alſo excuſed; *& ſic è converſo.*

[a] See Ch. 18. S. P. C. 30, 31. H. P. C. 116.

Sect. 3. III. As the Party himſelf ſeems not to be guilty of Felony by breaking the Priſon unleſs he go out of it; ſo neither is a Stranger unleſs the Priſoner actually go out of the Priſon.

Keilw. 87. a. Bro. Eſcape. 52.

Sect.

Fitz. Endicement, 30. 1 H. 7. 6. pl. 2.

Sect. 4. IV. As the Sheriff's Return, that a Priſoner hath broken the Priſon, is not a ſufficient Ground to arraign him for ſuch Offence, unleſs he be indicted alſo for it; ſo neither is his Return of a Reſcous a good Ground for the Arraignment of the Reſcuer, unleſs he be indicted.

Vide Supra. Ch. 18. S. 19. & Ch. 19. S. 14. Dyer. 164. pl. 60.

Sect. 5 V. As an Indictment of breaking Priſon, and alſo an Indictment of Eſcape, muſt ſpecially ſet forth the Nature and Cauſe of the Impriſonment, and the ſpecial Circumſtances of the Fact in queſtion, ſo alſo muſt an Indictment of Reſcous.

Vide Supra. Ch. 18. Sect. 20.

Sect. 6. VI. As thoſe who break Priſon are ſtill puniſhable, as for a high Miſpriſion, by Fine and Impriſonment, in thoſe Caſes wherein they are ſaved from Judgment of Death, by the Statute *de frangentibus priſonam*, ſo alſo are thoſe who reſcue ſuch Priſoners in the like Caſes, in the ſame manner puniſhable.

2. The Offence of Reſcous differs from that of breaking Priſon in the following Particulars.

Vide Supra. Ch. 18. S. 16.

Sect. 7. I. Whereas a Perſon committed for High Treaſon, who breaks the Priſon and eſcapes, is guilty of Felony only, unleſs he lets others alſo eſcape whom he knows to be committed for High Treaſon, in which Caſe he is guilty of High Treaſon, not in reſpect of his own breaking of the Priſon, but of the Reſcous of the others. A Stranger [a] who reſcues a Perſon committed for and guilty of High Treaſon, knowing him to be ſo committed, is in all Caſes guilty of High Treaſon; and by ſome [b] he is in like manner guilty, whether he knew that the Priſoners were committed for High Treaſon or not; but this Opinion is not proved by the Authority of the Caſe [c] on which it ſeems to be grounded.

[a] S. P. C. 11. C. 32. F. H. P. C. 109. Dalt. fol. 228. 1 Jo. 455. 1 H. 6. 5. b. Fitz. Coron. 2. Bro. Treaſ. 11.

[b] Cro. Car. 583.

[c] 1 H. 6. 5. b.

Sect. 8. II. Whereas a Priſoner who breaks the Priſon, may be arraigned [d] for ſuch Offence before he be arraigned of the Crime for which he was impriſoned; he who reſcues one impriſoned for Felony cannot, according to the better [e] Opinion, be arraigned for ſuch Offence as for a Felony, till the principal Offender be firſt attainted; but if the Perſon reſcued were impriſoned for High Treaſon, the Reſcuer may immediately be arraigned, for that in High Treaſon all are Principals; alſo it ſeems, that he may be immediately proceeded againſt for a Miſpriſion only, if the King pleaſe.

[d] Supra Ch. 18. Sect. 17.

[e] Vide Supra. Ch. 19. H. P. C. 116. S. P. C. 43. Letter B. ſeems contray.

CHAP. XXII.

Of Attachment.

HAVING ſhewn in what manner Offenders may be apprehended without Proceſs from a Court of Record, I am now to ſhew in what Manner they may be brought into Court by ſuch Proceſs, of which there are two ſorts.

1. Such

1. Such as may be awarded by the Diſcretion of the Juſtices upon a a bare Suggeſtion, or their own Knowledge, without any Appeal, Indictment, or Information.

2. Such as can be awarded only upon ſuch Accuſations.

Sect. 1. And firſt, I ſhall conſider the nature of the firſt of theſe, which is generally called an Attachment, and is properly grantable in Caſes of Contempts, againſt which, for the moſt part, all Courts of Record generally, but more eſpecially thoſe of *Weſtminſter-Hall*, and above all the Court of King's Bench, may proceed, in a ſummary Manner according to their Diſcretion; and if they happen to be done by a Perſon preſent in the Court, and appear either from the Confeſſion of the Party on his Examination upon Oath, or by the View or immediate Obſervation of the Judges themſelves, the Court may immediately record the Crime, and commit the Offender, and alſo inflict ſuch farther Puniſhment as ſhall ſeem proper: And if ſuch Offences be done by a Perſon not preſent in Court, and be complained of by Affidavit, the Court will either make a Rule on the Party to attend at a certain Day, in order to anſwer the matter of the Complaint againſt him; or elſe will make a Rule upon him, to ſhew Cauſe why an Attachment ſhould not be granted againſt him; or elſe, if the Offence were of a very exorbitant Nature, as for Words of Contempt of the Court it ſelf, will grant an Attachment on the firſt Complaint, without any ſuch Rule to ſhew Cauſe; and the Party who is ordered to attend the Court in purſuance of ſuch Rule, ought regularly to appear in proper Perſon, and not by Attorney, as alſo muſt every one againſt whom an Attachment is granted; and if the Offence be of an heinous Nature, and the Perſon attending the Court upon ſuch a Rule to anſwer it, or appearing upon an Attachment, be apparently guilty, the Court will generally commit him immediately, in order to anſwer Interrogatories, to be exhibited againſt him in relation to ſuch Contempt. But if there be any favourable Circumſtances to extenuate or excuſe the Offence, or if it appear doubtful whether the Party were guilty of it or not, the Court will generally, in their Diſcretion, ſuffer the Party, having firſt given Notice of his intention to the Proſecutor, to enter into a Recogniſance to anſwer ſuch Interrogatories; and if no ſuch Interrogatories be exhibited within four Days after ſuch Recogniſance, will diſcharge the Recogniſance upon Motion; yet if the Party do not make ſuch Motion, and the Interrogatories be exhibited after the four Days, the Court will compell him to anſwer them: But in all the Caſes above-mentioned, if the Party fully purge himſelf upon Oath, in his Anſwer to ſuch Interrogatories, of the whole matter charged upon him, the Court will diſcharge him of the Contempt, and leave the Proſecutor to proceed againſt him for the Perjury if he thinks fit: But if the Party confeſs part of the Contempts in his Anſwer to ſuch Interrogatories, and deny others, the Court will not diſcharge him from the Contempts ſo denied, but will proceed farther to examine the Truth of them, and will inflict ſuch Puniſhment as from the whole ſhall appear to be reaſonable; neither will the Court diſcharge the Party upon a ſhifting or evaſive Anſwer to any material Part of the Charge againſt him, but will puniſh him in the ſame manner as if he had confeſſed it.

Fitz. Corody 4

Raſtal. 268. pl. 4, 5. Raym. 376. Cro. Car. 146.

1 Rol. Rep. 315.

Salk. 84.

3 H. 7. 6. pl. 4. 22 Ed. 4. 33. b. 34.

6 Mod. 73.

6 Mod. 73.

The Queen and Barber, Mich. 11. Annæ.

6 Mod. 73. 2 Jon. 178.

2 Jo. 178.

But for the better underſtanding in what Caſes the Court may proceed in the manner above-mentioned againſt ſuch Offenders, I ſhall endeavour to ſhew,

1. Where it may ſo proceed againſt the Miniſters of the Court.
2. Where againſt others.

As to the firſt of theſe Points I ſhall conſider,

1. Where it may ſo proceed againſt Sheriffs, Bailiffs of Franchiſes, and Sheriffs Bailiffs.
2. Where againſt Attorneys, and others acting as ſuch.
3. Where againſt other Officers.
4. Where againſt Jurors.

As to the firſt of theſe Points I ſhall endeavour to ſhew,

1. Where the Court may ſo proceed againſt Sheriffs, Bailiffs of Franchiſes, and Sheriffs Bailiffs, for not executing a Writ.
2. Where for doing it oppreſſively.
3. Where for not doing it effectually.
4. Where for making a falſe Return.

Sect. 2. As to the firſt Particular, *viz.* In what Caſes the Court may proceed in the manner above-mentioned againſt Sheriffs, *&c.* for not executing a Writ; It ſeems clear from the general reaſon of the Law, which gives all Courts of Record a kind of diſcretionary Power over all Abuſes, by their own Officers, in the Adminiſtration or Execution of Juſtice, which bring a Diſgrace on the Courts themſelves, as not taking ſufficient Care to prevent them; that where-ever it ſhall appear, that any ſuch Officers have been guilty of any corrupt Practice in not ſerving any Writ, as where they refuſe to do it unleſs paid an unreaſonable Gratuity from the Plaintiff, or receive a Bribe from the Defendant, or give him notice to remove his Perſon or Effects, in order to prevent the ſervice of any Writ, the Court which awarded it may puniſh ſuch Offences in ſuch manner as ſhall ſeem proper, by Attachment, *&c.* as well as the Court of King's Bench, which has a general Superintendency over all Crimes whatſoever (as the Star Chamber [a] had alſo formerly) but commonly leaves Offences of this kind, in relation to Cauſes in other Courts, to be puniſhed by ſuch Courts to which they more immediately belong. But if there neither appear to have been any palpable Corruption in the Caſe, nor particular Obſtinacy, as by diſobeying a ſpecial Rule of the Court, in relation to the Service of ſuch Writ, nor other extraordinary Circumſtances of wilfull Negligence, the Judgment whereof is to be left to the Diſcretion of the Court, it ſeems not to be uſual to grant an Attachment in ſuch Caſes, but to leave the Party to his ordinary remedy againſt the Officer, which he may have either by ſerving him with Rules to return the Writ, *&c.* or by ſuing him for the Damage ſuſtained by his Negligence, in an Action of Eſcape, or on the Caſe, or by taking out an *Alias* [b] and *Pluries*, which if the Sheriff do not execute, an Attachment, directed to the Coroners, goes againſt him of courſe, unleſs he give a good Excuſe for his not having done it.

Dy. 218. pl. 4.

[a] Hob. 62, 263, 264. Noy. 101.

Hob. 264. *Laſely verſus* Weſton. See Fitz. proceſs, 13, 104.

[b] F. N. B. 38. C. 47. C. 265. F. Finch 237. 5 Mod. 314, 315. Hob. 62, 263, 264.

Sect. 3. As to the ſecond Particular, *viz.* Where the Court may proceed in the Manner above-mentioned, againſt a Sheriff, or Bailiff, *&c.* for an oppreſſive Practice in the Execution of a Writ; it is every Day's Practice to grant Attachments for Miſdemeanours of this kind, as for uſing needleſs Force, Violence and Terror, in making an Arreſt, or by breaking open Doors where by Law it is not juſtifiable, and there is no plauſible

plauſible Excuſe for doing it, or treating the Perſons arreſted baſely and inhumanly, or keeping them in Cuſtody till they conſent to pay Money for their Deliverance, or making an Arreſt without due Authority, as by force of a blank [a] Warrant, filled up with the Name of a ſpecial Bailiff by the Party himſelf, or Bailiff, without the Privity or ſubſequent Agreement of the Sheriff; yet I have ſometimes known Attachments of this kind denied, in reſpect of the common uſe of the Practice, which by Experience hath been found to be almoſt neceſſary in ſome Caſes to prevent the Defendants having notice of the intended Arreſt, and therefore, if it ſhall appear to the Court, that there was any ſuch reaſonable Cauſe for ſuch a Proceeding, it will be a great Inducement to excuſe, if not wholly to diſpence with it.

11 H 6. 42. b. 43 a.

[a] Noy. 101. Moor, 770. pl. 1064. 2 Rol. Abr. 278. H.

Sect. 4. As to the third Particular, *viz.* Where the Court may proceed in the Manner above-mentioned, againſt a Sheriff, or Bailiff, *&c.* for not executing a Writ effectually; it ſeems clear, That where any ſuch Officer is guilty of a corrupt Practice in depriving the Party who ſues out a Writ of that Benefit and Advantage which he ought to have from the Execution of it, he is liable to be puniſhed in the Manner above-mentioned, as if he levy a Debt by vertue of an Execution, and keep the Money in his own Hands, and imbezil it: But unleſs there appear ſome groſs and palpable Corruption in a Sheriff neglecting to return a Writ which hath been executed by him, or to bring in the Body or Money, *&c.* according to his Return, the Court will hardly grant an Attachment againſt him immediately, but will rather proceed againſt him by Rules to return the Writ, *&c.* and if he do not obey them, will increaſe the Amercements upon him till he do, or perhaps grant an Attachment for the Contempt: And [b] if the Sheriff return, That he ſent the Proceſs to the Bailiff of a Liberty, who hath given him no anſwer, a *non omittas* ſhall be awarded to the Sheriff: And if he return, That he ſent the Proceſs to ſuch Bailiff, who hath returned a *cepi Corpus*, or ſuch like matter, and the Bailiff bring not in the Body or Money, *&c.* at the Day, by the better [c] Opinion the Bailiff ſhall be amerced, and a Writ [d] ſhall iſſue to the Sheriff, to diſtrain the Bailiff to bring in the Body, *&c.*

[b] Fitz. Proceſs, 13, 32.

[c] Raſtal 109. Capias pl. 20. 189. pl. 20, 21, 22. 670. pl. 2. 36 H. 6 1. Contra Bro. Proceſs, 25. Fitz. Return de Vicont. 35. 3 H. 7. 11. 47 Aſſ. pl. 6.

[d] Fitz. Proceſs, 12, 14, 104, 122, 132, 135, 225. Execution, 101. Retornde vicount, 35. 27 Ed. 3. 83. pl. 8. 27 Ed. 3. 77. pl. 9. pl. 14. 11 H. 19. Return

Sect. 5. As to the fourth Particular, *viz.* Where the Court may proceed in the Manner above-mentioned, againſt a Sheriff, *&c.* for making a falſe return to a Writ; There ſeems [e] to be no doubt, but that whereever any ſuch Officer endeavours to impoſe upon a Court, by making a Return to a Writ of a Matter known by him to be falſe, he is, in ſtrictneſs, liable to be puniſhed in this manner for his Contempt: Yet it ſeems, That the Court will not eaſily be prevailed on to proceed in this manner for a bare falſe Return, but will rather leave the Party injured by it to his remedy, by an Action on the Caſe, unleſs there be ſome extraordinary circumſtances of Hardſhip or Oppreſſion. as where [f] an Officer who had arreſted one on a *Capias*, returned, That he had taken him, but that the Party was ſo ſick, that he could not bring in his Body at the Day for fear of endangering his Life, where in Truth the Party had been all the while in good Health, and was only detained under ſuch pretence, in order to extort Money from him, *&c.*

Raſtal. 109. Capias, pl. 20. Bro. Proceſs, 25, 48, 113, 115. Bro Return, 96, 99. 5 Ed. 4. 4. 43. pl. 13. 38 Ed. 3. 1. b. 39 Ed. 3. 3. 8 H 5. 2. pl. 8. [e] Fitz. Proceſs, 5. Bro. Surmiſe, de Brief, 100. Raſtal Habeas Corpus, 7. [f] 11 H. 6. 42. b.

As to the ſecond Point, *viz.* In what Caſes the Court may proceed in the Manner above-mentioned, againſt Attorneys, and others acting as ſuch, I ſhall endeavour to ſhew,

1. Where it may ſo proceed againſt them, for appearing for a Perſon without ſufficient Authority.
2. Where for injuſtice to their Clients.
3. Where for other Contempts to the Court, or diſhoneſt Practice.

Sect. 6. As to the firſt of theſe Particulars, *viz.* Where the Court may proceed, in the Manner above-mentioned, againſt Attorneys, and others acting as ſuch, for appearing for any Perſon without ſufficient Authority; There is no doubt [a] but that it may ſo proceed againſt them, for taking upon them to proſecute or defend a Suit for another, without any manner of Directions from him; alſo if they have in Truth a Warrant from the Party, but do not cauſe it to be recorded before Judgment, it ſeems [b] that they are in ſtrictneſs liable to an Attachment, for that the Court takes no judicial Notice of any ſuch Warrant not of Record; yet [c] if in ſuch Caſe it appear, upon Examination, that the Warrant of Attorney happened not to be recorded, through the Negligence of the Officer, or ſome ſuch like Accident, attended with no corrupt Practice in the Attorney, it ſeems, that the Court would never eaſily be prevailed on to proceed in this Manner againſt the Attorney; and much leſs at this Day, ſince he is liable by Statute to a certain pecuniary Forfeiture for every Offence of this kind.

[a] 38 Ed. 3. 8. b. 41 Ed. 3. 1. pl. 3. Raſtal. 582. pl. 28. 16 Ed. 4. 5. b.

[b] Raſtal. 96. pl. 3.

[c] Fitz. Judgment, 96. 41 Ed. 3. 1. pl. 3. 38 Ed. 3. 8. b. 4 Ed. 4. 13. pl. 31. 16 Ed. 4. 5. b. Raſtal 582. pl. 28.

Sect. 7. For it is enacted by 32 *H.* 8. 30. made perpetual by 2 *Ed.* 6. 32. and by 18 *El.* 14. and 4 & 5 *Annæ* 16. *That the Plaintiff's Attorney ſhall file his Warrant the ſame Term he declares, and the Defendant's Attorney the ſame Term he appears, on pain of forfeiting ten Pounds, and alſo ſuffering ſuch Impriſonment, as by the Diſcretion of the Juſtices of the Court, where any ſuch Default ſhall fortune to be, ſhall be thought convenient.*

Cokes Entries, 167.

Sect. 8. And it ſeems, That ſince theſe Statutes, it hath not been uſual to grant Attachments in theſe Caſes, without ſome apparent Circumſtances of Fraud, or other Corruption.

Vide Dyer, 180. pl. 48. Raſtal 289. pl. 2.

Sect. 9. But howſoever a regular Attorney may be excuſed from an Attachment, for not having recorded his Warrant, thoſe have no reaſon to expect the like favour from the Court, who take upon them to appear for others as Attorneys, without having been admitted and ſworn as ſuch, for theſe are liable to an Attachment for every Appearance, whether their Warrant were recorded or not.

Raſtal. 93. pl. 3.

Sect. 10. As to the ſecond Particular, *viz.* Where the Court may proceed in the Manner above-mentioned againſt Attorneys, and others acting as as ſuch, for Injuſtice to their Clients; It is every Day's Practice to move for it againſt them, for baſe and unfair Dealing towards their Clients in the way of Buſineſs, as for protracting Suits by little Shifts and Devices, and putting the Parties to unneceſſary Expences in order to raiſe their Bills, or demanding Fees for Buſineſs which never was done, or for refuſing to deliver up to their Clients, Writings with which they had been intruſted, in the way of Buſineſs, or Money which has been recovered and received by them to their Clients Uſe, and for other ſuch like groſs and palpable Abuſes: But the Court will ſeldom grant an Attachment for the detainer of ſuch Writings or Money, without firſt making a Rule on the Attorney to deliver them to the

See 4 H. 4. Ch. 18. 3 Ja. 1. 7.

the Party; alſo it will juſtify an Attorney's detaining ſuch Writings or Money for his Security till he be paid all his juſt Fees; nor will it ever interpoſe in this Manner as to any Writings or Money received by an Attorney on any other Account, except only in his way of Buſineſs as an Attorney, but will leave the Party to his ordinary remedy by Action. Salk 87. pl. 7.

Sect. 11. As to the third Particular, *viz.* Where the Court may proceed in the Manner above-mentioned, againſt Attorneys, and others acting as ſuch, for other Contempts to the Court, or diſhoneſt Practice, it ſeems, That it may not only proceed in ſuch Manner againſt them for Diſobedience of its Rules, after Notice given them of ſuch Rules, either expreſsly or impliedly; but alſo, for any ſuch ill Practice as is againſt the known and obvious Rules of Juſtice and common Honeſty; as for Forging [a] a Writ, or any other matter of Record, [b] or but attempting to do it; or for taking out a *Capias*, [c] which has no Original to warrant it; or for receiving [d] Money of the Client for ſuing out an Original, and alſo for the Fine due thereon to the King, where, in Truth, no Original has been ſued out, nor any Fine paid to the King; or for endeavouring to impoſe upon the Court, as [e] by cauſing an Action to be brought againſt one in it by Colluſion, without any juſt ground, in order thereby to intitle the Party to the Privilege of the Court, and afterwards, upon the examination of the Matter in Court, giving a falſe Account of it; or [f] for giving directions to a Sheriff concerning what Perſons he ſhould return on a Panel; and for other Miſdemeanours of the like Nature.

[a] Cro. Car. 74. Dyer. 241. pl. 50. 244. pl. 58.
[b] Fitz. Attachment, 7.
[c] 20 H. 6. 37. a. Fitz. Attachment, 3.
[d] Cro. Car. 74.
[e] 16 Ed. 4. 5. Bro. Privilege, 43.
[f] Moore, 882. pl. 1237.

Sect. 12. As to the third Point, *viz.* Where the Court may proceed in the Manner above-mentioned, againſt other Officers of the Court; There being ſcarce any thing of this kind to be met with in the Books, I ſhall only obſerve, That it ſeems clear, from the general Reaſon of the Law, which gives all Courts of Record a kind of diſcretionary Power in the Government of their own Officers, that any ſuch Court may proceed in ſuch manner againſt any ſuch Officer, not only for refuſing to execute its Commands, or for executing them irregularly, remiſsly, [g] or oppreſſively, but alſo for all kinds of Oppreſſion or Injuſtice done by them in the Execution of their Offices, or by Colour of them.

Vide Supra. Sect. 1. Fitz. Offida del. Court, 12. Raſtal. 329. pl. 8. 268. pl. 5.

Sect. 13. As to the fourth Point, *viz.* In what Caſes the Court may proceed in the Manner above-mentioned, againſt Jurors, It is obſervable, that Jurors may be conſidered either in a Miniſterial Capacity, *viz.* as Perſons bound to attend the Court, in order to perform the Duty for which they are returned, untill they ſhall be diſcharged; or in a Judicial Capacity, *viz.* as Judges of the Fact which is to be tried or inquired by them; and therefore, for the better underſtanding of this Matter, I ſhall conſider,

Dy. 218. pl. 4.
[g] Fitz. Treſpaſs, 73. 33 H. 6. 55. b. 56. a.

1. How far Jurors are puniſhable in the manner above-mentioned, in their Miniſterial Capacity.
2. How far in their Judicial.

As to the firſt Particular, it ſeems clear, That Jurors are puniſhable in the Manner above-mentioned in their Miniſterial Capacity, in the following Inſtances.

Sect. 14. I. For making Default; as where more than one of the Perſons returned on a Jury, do appear; but not a ſufficient Number to take an Enqueſt, 48 Ed. 3. 3.

Enqueſt, and ſome [a] of the others come within View of the Court, or into the ſame Town [b] in which the Court is holden, but refuſe to come into the Court to be ſworn; in which Caſes, upon Proof of ſuch Matter, the Court [c] may, at the Prayer of the Party, order the Jurors who appeared, to inquire what is the Yearly Value of ſuch Defaulters Lands, and after ſuch Inquiry made, either ſummon them to appear, on pain of forfeiting ſuch Sum as their Lands have been found to be worth by the Year, or ſome leſſer [d] Sum, or impoſe [e] a Fine of the like Sum upon them, without any farther Proceeding. But it ſeems, [f] That ſuch Juror ſhall be liable to loſe his Iſſues only for ſuch Default, and not the yearly Value of his Lands, unleſs the Party pray it: But a Juror [g] who hath actually appeared, and after makes Default, is ſaid to be ſubject to ſuch Forfeiture of the yearly Value of his Lands, whether the Party pray it or not, becauſe his Contempt appears to the Court by its own Record; yet [h] even in this Caſe the Court, in Diſcretion, will ſometimes only impoſe a ſmall Fine. Alſo it is ſaid, That no Juror ſhall be ſubject to ſuch Penalty, where [i] the Inqueſt could not be taken if he had appeared, as where but five of the Jurors ſummoned on an Aſſiſe, have had a View of the Land. Alſo it ſeems, [k] That a Juror who makes Default without ever coming into the Town wherein the Court is holden, is liable only to loſe his Iſſues, or to be amerced, but not to be fined: And it is ſaid, That he ſhall neither [l] be fined nor amerced if the Defendant be eſſoined on the Day on which the Jury was to appear, for that his Appearance in ſuch Caſe would be to no purpoſe; and it ſeems [m] queſtionable whether a Juror be amerciable for not appearing at the Return of a *Sicut alias Venire facias*, where the firſt *Venire* was not ſerved; neither doth a Juror ſeem to be amerciable at all, at the Day of the Return of the firſt *Venire* [n] *facias*, except before Juſtices errant, or of Oyer and Terminer, &c.

Sect. 15. II. For refuſing to to be ſworn when they do appear; for which, as it ſeems, [o] every Court of Record may of common Right impoſe ſuch a reaſonable Fine on any one returned on a Grand or Petit Jury, as ſhall ſeem convenient.

Sect. 16. III. For refuſing [p] to give any Verdict at all.

Sect. 17. IV. For endeavouring to impoſe upon the Court; as where [q] a Petit Jury offer a Verdict to the Court, as agreed to by their whole Number, where, in Truth, ſome of them have not agreed to it; or where [r] they agree upon two Verdicts, and firſt to offer one of them to the Court, and to ſtand to it, if the Court ſhall expreſs no Diſſatisfaction to it; but if the Court ſhall diſlike it, then to give the other.

Sect. 18. V. For misbehaving themſelves after their Departure from the Bar; as where they [s] do not all keep together till they have given their Verdict; or where any [t] of them carry any thing eatable with them in their Pockets; or eat [u] or drink, or otherwiſe refreſh themſelves without Leave from the Court, before they have given their Verdict, though they were agreed [x] on it, and were alſo all the time in the Cuſtody of the Bailiff appointed to take Care of them.

[a] Raſtal. 267. b. pl. 2. 268. a. pl. 3.
[b] Raſtal. 267. b. pl. 1. 30 Aſſ. pl. 3, 42. 48 Ed. 3. 30. Bro. Jurors, 25, 26. 20 Aſſ. pl. 11.
[c] Raſtal. 267. b. pl. 12, 268. a. pl. 3. 4 Ed. 4. 37. a. 9 H. 4. 5. a. 20 Aſſ. pl. 11. 8 Co. 41. a.
[d] Raſtal. 267. b. pl. 2.
[e] Raſtal. 267. pl. 2. 268. pl. 3.
[f] Fitz. Peine, 1, 2. 30 Aſſ. 42. 4 H. 6. 7. a. 4 Ed. 36. b. 37. a. 36 H. 6. 27. a. Bro. Jurors, 15, 18. 26. Ehqueſt, 42.
[g] Fitz. Challenge, 47. 36 H. 6. 27. a.
[h] Fitz Office de Court, 12.
[i] Fitz Peine, 3. 9 H 4. 5. a.
[k] 10 E. 41. 19.
[l] 10 Ed. 4. 19. 30 Aſſ. pl. 17.
Quere 48 Ed. 3. 12. a. 12 Aſſ. pl. 14 Fitz. Aſſiſe, 65.
[m] 1 H. 7 8. a.
[n] Fitz. Aſſ. 136, 466. 11 Aſſ. pl. 7. Bro. Amercement, 68.

See the Chapter of Proceſs againſt Jurors. [o] 2 Inſt. 242, 143. 44 Ed. 3. 19. b. 8 Co. 38. b. 7 H. 6. 12. b. [p] Vaughan 152. Noy. 49. 3 Bulſt. 173. 9 H. 6. 44. b. [q] 29 Aſſ. pl. 27. Bro. Jurors, 28. 40 Aſſ pl. 10 1 Rol. Abr. 219. pl. 4. [r] Cro. El. 779. [s] 14. H. 7. 29 b. 30. Vaughan, 151. [t] Dyer 78. pl. 41. [u] Dyer 218 pl. 4. Vaughan, 152. Cro. Jac. 21. Fitz. Examination, 17. Bro. Jurors, 13. [x] Raſtal. 268 pl. 4, 5.

Sect.

Sect. 19. VI. For ſending [a] for, or receiving Inſtructions from either of the Parties concerning the Matter in queſtion, and therefore [b] much more for receiving a Bribe.

[a] Raſtal 329. b. pl. 8. Hob. 114. Fitz. Exami. 17.

[b] 40 Aſſ. 43.

Sect. 20. As to the ſecond Particular, *viz.* How far Jurors are puniſhable in the Manner above-mentioned, in their judicial Capacity, It ſeems to be the current Opinion of the Old Books, that Jurors are not ſubject to any Proſecution for a falſe Verdict, except by way of Attaint: And there ſeem to be very few ancient Precedents, for the Puniſhment either of a Grand or Petit Jury, meerly for giving a Verdict againſt Evidence, or the Direction of the Court, either in a Criminal or Civil Matter. It is ſaid [c] indeed in *Fitzherbert*'s Abridgment of a Caſe in the time of King *Richard* II. That the Judge told the Jury, upon their acquitting a common Thief of an Indictment, That they ſhould be bound to their Behaviour for their Lives: But this was only the ſudden Opinion of a Judge; and it doth not appear, that the Jurors were afterwards actually ſo bound, in purſuance of the ſaid Opinion; and *Fitzherbert* makes a Query in his Abridgment of the Caſe, by what Law they could be ſo bound: And as to thoſe three [d] other Caſes in the time of King *Edward* III. wherein it is ſaid, That a Juror was committed for refuſing to agree with the other eleven, it may be anſwered, That it is ſaid [e] in the firſt of thoſe Caſes, *That ſuch Juror ſtaid his Companions a Day and a Night, without agreeing with them, and this without Reaſon*; from whence it is reaſonable to intend, That there might be ſome Circumſtances of Misbehaviour, as an obſtinate perverſe Reſolution, right or wrong, to find a Verdict one way, and not to conſult with the other Jurors, nor hear their Reaſons, *&c.* And in the laſt of the [f] ſaid Caſes it is ſaid, That the Juror committed by the Juſtices of Aſſiſe, for refuſing two Days and a Night to agree with his Companions, and ſaying, That he would rather dye in Priſon than agree with them, was afterwards diſcharged by the Juſtices of the Common Bench, upon the adjournment of the Aſſiſe thither. And it was part of the Charge againſt *Empſon*, who was indicted in the beginning of the Reign of King *Henry* VIII. for a great Complication of Offences, That he had committed a Jury to ward, and bound them to appear before the King and his Council, and afterwards, on their Appearance, fined them (though with the Concurrence of the reſt of the Council) in the Sum of 8 *l.* a piece, for refuſing to find a Perſon guilty of an Indictment of Larceny, upon ſufficient Evidence; yet it is ſaid in *Daliſon*'s [h] Reports of Caſes, in the third and fourth years of *Philip* and *Mary*, That it was agreed, that Juſtices of Aſſiſe, Oyer and Terminer, Gaol-Delivery, or Peace, have no Power indeed to aſſeſs Fines on Jurors who make a falſe Oath before them, but that they may give them a Day before themſelves, or the King's Council; by which it ſeems to be implied, That ſuch Jurors were then thought to be ſome way or other Puniſhable by ſuch Judges, or at leaſt by the King's Council; for otherwiſe it would be to little purpoſe to bind them to appear before them. Alſo it ſeems to be holden by Sir *Edward Coke*, [i] That though a Jury be no way puniſhable for Convicting a Man upon an Indictment againſt Evidence, yet they might be charged in the Star-Chamber for their Partiality in finding a manifeſt Offender not guilty: And about [k] the later end of the Reign of Queen *Elizabeth*, a Jury was committed and fined, and bound to the Good Behaviour, for finding one *Wharton* guilty of Manſlaughter only, againſt clear Evidence, and the Direction of the Court, upon an Indictment of Murder: And it is ſaid in *Palmer*'s [l] Reports, That Jurors, who go againſt

See Book 1. Ch. 72. S. 4.

[c] Fitz. Coro. 108.

Vaughan, 152.

[d] Fitz Impriſonment, 4. Judgment 89. Verdict 40.

[e] 8 Aſſ pl. 35. Vaughan, 151.

2 Jon. 16, 17.

[f] 41 Aſſ. pl. 11. 41 Ed 3. 31. Vaugh. 151.

[g] Raymond, 88, 89.

[h] Daliſon, 18.

[i] 12 Co 23, 24.

[k] Yelv. 23. Noy. 48, 49.

[l] Palmer, 36.

againſt the Directions of the Court are to be fined: And there are ſeveral inſtances in the beginning of the Reign of King *Charles* II. wherein it was reſolved, That both Grand [a] and Petit [b] Juries were finable by the Juſtices of Gaol Delivery, for going againſt plain Evidence, and the Directions of the Court; but theſe Proceedings were always thought Grievous, and were complained [c] of in the Houſe of Commons; and this Queſtion was at laſt fully conſidered and debated in *Buſhel's* Caſe, who having been committed by the Juſtices of Oyer and Terminer at the *Old Baily*, brought his *Habeas Corpus* in the Court of Common Pleas, to which it was returned, That he was committed for the Fine of forty Marks, impoſed on him for having, with other Jurors, acquitted certain Defendants of an Indictment for an unlawful Aſſembly, againſt full and manifeſt Evidence, and againſt the Direction of the Court in matter of Law; and upon this Return he was diſcharged, and the Return was adjudged inſufficient, for not ſetting forth particularly [d] ſo much of the Evidence that it might appear that it was full and manifeſt; and likewiſe [e] for not ſetting forth, That the Defendant did know, and believe it to have been full and manifeſt; and alſo, [f] for not ſhewing what the Direction of the Court was, and in what manner the Defendant found againſt it. And it was alſo reſolved, [g] That Petit Jurors are in no Caſe finable for giving a Verdict againſt the Evidence delivered in Court, whether they be liable to an Attaint for ſuch Verdict or not, not only for that the Jury are by Law the proper Judges of matter of Fact, as the Judges are of matter of Law, and therefore ought to be free in their Judgment of it, without being over-ruled by the Judges, who, ſtrictly ſpeaking, have no more to do with the Judgment of the Fact, than the Jurors have with the Judgment of the matter of Law; neither is it poſſible that a Judge can certainly know that a Juror acts corruptly in giving his Verdict contrary to the ſtrength of the Evidence delivered in Court; for he may be influenced by his own perſonal Knowledge of the Truth of the Fact, of the Credit of the Witneſſes, the Reputation of the Parties, and many other Circumſtances unknown to the Judge, and well known to the Jury, for which Cauſe the Law provided, That all Iſſues ſhould be tried by the Neighbourhood of the Place in which they are ſuppoſed to ariſe, becauſe Neighbours are preſumed to have better Knowledge than others of what concerns their Neighbours. And for theſe Cauſes, and other ſuch like, the Court of King's Bench granted an Information againſt a Town-Clerk, for publiſhing an Order of the Court againſt Jurors, who had found a Perſon guilty of Manſlaughter only, upon an Indictment of Murder, by which Order the ſaid Jurors were declared to be juſtly ſuſpected of Bribery, and declared uncapable of holding an Office, *&c.*

[a] 1 Syd. 229, 230. 2 Keb. 180.
[b] 1 Syd. 272, 273. Raym. 88, 89, 138. 1 Keb. 769, 938. 2 Keb. 404.
[c] 1 Syd. 338. 2 Keb. 180, 181.
[d] Vaughan, 142. 2 Jon. 16, 17.
[e] Vaughan, 142. 2 Jon. 16, 17.
[f] Vaughan, 143.
[g] Vaughan, 144, 145. 3 Keb. 352. 2 Jon. 16. Vide Hob. 114. Contra 3 Keb. 352.
Hilary, 10 Ann. Queen & Wakefield.

Sect. 21. Yet if it ſhall plainly appear in any Caſe, that Jurors are perfectly ſatisfied of the Truth of a Fact, whereupon they declare to the Court, that they find it in ſuch a particular Manner, and the Court directly tell them, That upon the Fact ſo found, as they have agreed it to be, the Judgment of the Law is ſuch or ſuch, and therefore, that they ought to give a Verdict accordingly, yet they obſtinately inſiſt upon a Verdict contrary to ſuch a Direction; it ſeems agreeable to the general Reaſon of the Law, that the Jurors are finable by the Court in ſuch a Caſe, unleſs an Attaint lies againſt them, for otherwiſe they would be diſpuniſhable for ſo palpable a Partiality, in taking upon them to judge of matters of Law, with they have nothing to do with, and are preſumed to

2 Jon. 15, 16. Vaughan, 144, 145. Palm. 363.

to be ignorant of, contrary to the expreſs Direction of one who by the Law is appointed to direct them in ſuch Matters, and is to be preſumed of Ability to do it.

Sect. 22. Alſo if a Judge, for the better Direction and Information of a Jury, ſhall ask them their Opinions concerning ſuch a particular Fact, and they ſhall refuſe to anſwer him, and obſtinately inſiſt to deliver in their Verdict as they think fit, contrary to his Direction, it ſeems queſtionable, whether they may not be fined in ſuch a Caſe alſo, unleſs an Attaint lie againſt them; for that it is the Duty of Jurors to take the Advice and Information of the Court, in order to be governed by it as far as ſhall be conſiſtent with their Conſciences.

Bracton 288. b. 289. 2 Jon. 15, 16. Vaughan, 144.

Sect. 23. Alſo if a Jury ſhall refuſe to find an Office for the King, upon full Evidence, it hath been holden, That they may be fined, for that in ſuch Caſe they are not liable to an Attaint, and their finding does not determine any Man's Right, and the King, in many Caſes, hath no other Remedy; yet it ſeems queſtionable, how far at this Day theſe Reaſons may be thought concluſive; and it ſeems, that they hold as ſtrongly for the Puniſhment of Grand Jurors refuſing to find an Indictment of High Treaſon; and yet it will be hard to maintain, That ſuch Jurors are any way puniſhable for ſuch a Refuſal.

Moor, 730. 3 Leon. 148. Vaughan, 153. 9 H. 6. 44, b

Sect. 24. But if a Petit Jury in a Leet, conceal a Matter preſentable by them, it is a good Cuſtom that they may be amerced for ſuch Concealment, being found by the Grand Jury; and by 3 *H.* 7. 1. ſet forth more at large Book 1. Ch. 59. S. 1. *If an Inqueſt conceal any matter inquirable before Juſtices of Peace, another Inqueſt may be impanelled to inquire of ſuch Concealments, and the Concealers may be amerced by the Diſcretion of ſuch Juſtices.*

9 H. 6. 44. b

Having ſhewn in what Caſes the Miniſters of the Court are puniſhable in the manner above-mentioned, I am now to ſhew, in whar Caſes others may be ſo puniſhed; and for this purpoſe I ſhall endeavour to ſhew,

1. Where inferior Judges are puniſhable in ſuch manner.
2. Where Counſellors.
3. Where Gaolers.
4. Where any Perſon whatſoever.

As to the firſt Point, I ſhall endeavour to ſhew, where inferior Judges are in ſuch manner puniſhable,

1. For proceeding without Juriſdiction.
2. For proceeding unjuſtly, oppreſſively, or irregularly.
3. For refuſing to do Juſtice.
4. For Contempts of ſuperior Courts.

Sect. 25. As to the firſt of theſe Particulars, *viz.* In what Caſes inferior Judges are puniſhable in the Manner above-mentioned, for proceeding without Juriſdiction; it ſeems, [a] That the Court of King's Bench having a general Superintendency over all inferior Courts, may in ſtrictneſs award an Attachment againſt any ſuch Court uſurping a Juriſdiction no way belonging to it, and putting the Subject to unneceſſary Vexation by colour of a judicial Proceeding wholly unwarranted

[a] 41 Aſſ. pl. 30. Salk. 201. 1 Keb. 484. Palm. 564.

by Law, and therefore [a] prohibited by it; yet in these Cases it seems to be rather the more usual [b] way, first to award a Writ of Prohibition to such Court, and afterwards an Attachment upon its proceeding after such Prohibition, and not to grant a Rule to shew Cause why an Attachment should not go in the first Instance, unless there be some extraordinary Circumstances in the Case; as where [c] the Steward of a Leet is guilty of a double Usurpation, as of holding Plea of a Matter which arose out of his Precinct, and which, if it had arisen within his Precinct, would not have been within the Jurisdiction of his Court; or where [d] the Judge of an inferior Court refuses to receive a Plea that the Cause of Action arose out of his Jurisdiction; or where [e] any Judge takes Cognisance of a Cause to which he himself is a Party; or where the Judge of a Court-Baron is privy to a Practice of splitting [f] a Cause of Action for more than forty Shillings into lesser Sums, in order to bring it within the Jurisdiction of the Court; but in this last Case, there seem to be more instances [g] of Prohibitions than Attachments; and in the Cases above-mentioned, and all others of the like Nature, it seems to lie wholly in the Discretion of the Court to grant either.

[a] Vide 19 H. 6. 54. b. 9 H. 6. 61. F. N. B. 270. c.
[b] Register, 145. 146. F. N. B 239. H. 240. B. 1 Syd. 464. 6 Mod. 90. 2 Inst. 312. 2 Rol. Abr. 317. Letter I.
[c] 41 Ass. 30. Fitz. Leete. 9. Bro. Leete, 18, 31.
[d] Vaughan and Hodges Paschæ, 11. Annæ.
[e] Salk. 201. pl. 3.
[f] Palmer 564. 1 Keb. 484.
[g] 19 H. 6. 54. 2 Rol. Abr. 317. I. pl. 1. 6 Mod. 90. 2 Keb. 617. 1 Ventries, 65, 73. 1 Keb. 484. 1 Syd. 464.

Sect. 26. As to the second Particular, *viz.* In what Cases inferior Judges are punishable in the Manner above-mentioned, for acting unjustly, oppressively, or irregularly; it is not easy to meet with Cases of this kind in the Books, there being seldom any thing in them so remarkable as to be thought worth reporting; but it seems to be common Practice, to grant Attachments against the Judges of such Courts for any Practice contrary to the plain Rules of natural Justice, though it have been never so long used in such Courts; as for denying a Defendant a Copy of the Declaration against him, and going on to Trial, or giving Judgment against him without giving him any manner of Notice, or Time to make his Defence; or for taking of unreasonable [h] Distresses, either on mesne Process, or Execution; or for compelling [i] a Defendant to give exorbitant Bail; or for proceeding contrary to the Prohibition [k] of a Statute, as [l] by amercing a Clergyman according to his spiritual Benefice; or by assessing [m] an Amercement without any affeerment by the Tenants of the Manor; or by [n] taking Money of a Plaintiff or Defendant for vicious Pleading.

[h] Salk. 201. 3 Keb. 92.
[i] 2 Jon. 178.
[k] F. N. B. 76. D. 160. B. 165. C. 166 D. 270. C. 9 H. 6. 61. 19 H. 6. 54.
[l] F. N. B. 76. B. C. D.
[m] F. N. B. 76. D.
[n] F. N. B. 270. A. B. C. 2 Inst. 122. Fitz. Attachment, 8.

Sect. 27. As to the third Particular, *viz.* In what Cases inferior Judges are punishable in the Manner above-mentioned, for refusing to do Justice; It seems clear, from the general Reason of the Law, and the common Practice of the Court of King's Bench in Cases of this Nature, That the said Court may, in its Discretion, award an Attachment against any such Judge, obstinately and perversely, and without any colour of a reasonable Excuse, refusing to proceed at all, or to give Judgment, or award Execution, in a Matter brought regularly before him; for all such Delays of Justice are not only grievous to the Suitor, but bring a Disgrace upon the Law it self: Yet if there be no extraordinary Circumstances in any such Delay, to bring the Judge under a reasonable Suspicion of Corruption, it seems the more usual Method to take out a Writ to such Judge, commanding him to do the thing, of the Delay whereof you complain; and if such Writ be not obeyed, to take out an *Alias & Pluries*, or to take [o] out the *Alias & Pluries* together with the first Writ; and thereupon, if the Judge refuse to comply, to take out an Attachment against him at the Suit of the King and of the Party, which may either be returnable into the Court of King's Bench, or at

[o] F. N. B. 68. E. Infra. Sect. 34.

at the Party's election into the Court of Common Pleas, except in some special [a] Cases; and this seems [b] to be the proper Remedy to compel the Lord of a Mannor to hold a Court for the determining of a Writ of Right Patent, or a Writ [c] of Right Close; or to compel the Judge of any inferior Court, whether of Record [d] or not, to proceed [e] in a Plea, or to give Judgment, [f] or to award Execution. [g]

Sect. 28. As to the fourth Particular, *viz.* In what Cases inferior Judges are punishable in the Manner above-mentioned, for Contempts of superior Courts: There is no doubt but that Justices [h] of Peace, or Commissioners [i] of Sewers, may be so punished for proceeding in any Matter before them, after a *Certiorari* delivered to them, or the Judge of a Spiritual [k] or Civil [l] Law Court, for proceeding in a Cause, after Notice of a Rule to shew Cause why a Prohibition should not go, or a Judge of any inferior Common Law Court, for proceeding in a Cause after a *Habeas Corpus*, or Writ of Error allowed; or a Sheriff, [m] for proceeding in Replevin, or other Cause, in the County-Court, after a *Supersedeas*, *Pone*, or *Recordare*. Also a Rule [n] has been granted to shew Cause why an Attachment should not go against the Steward of a Wapentake for proceeding after a Tolt, though this be only a Contempt to the County-Court.

Sect. 29. Also Justices of Peace may be punished in the Manner above-mentioned, for acting in a Contemptuous manner against the Determination of the Court of King's Bench; as where an Order of Settlement, specially setting forth the Circumstances of the Case, is removed into the said Court, and quashed there, by the Judgment of the Court, upon the Merits; and yet the Justices of Peace afterwards make another Order to remove the same Person to the same Place, for the very same Cause, without regarding the Judgment of the Court, though it were well known to them, and insisted on by the Parties.

Sect. 30. As to the second Point, *viz.* In what Cases Counsellors are punishable in the Manner above-mentioned, it seems clear, That notwithstanding they are neither Officers of any Court, nor invested with any judicial Office, but barely practise as Counsellors, yet [o] inasmuch as they have a special Privilege to practise the Law, and their Misbehaviour tends to bring a Disgrace upon the Law it self, they are punishable for any foul Practice as other Ministers of Justice are.

Sect. 31. As to the third Point, *viz.* In what Cases Gaolers are punishable in the Manner above-mentioned, it seems clear, That they are not only punishable in this Manner, as all other Officers are, by the Courts to which they more immediately belong, for any gross Misbehaviour in their Offices, or Contempts of the Rules of such Courts, but they are also punishable by any other Courts for disobeying Writs of *Habeas Corpus* awarded by such Courts, and not bringing up the Prisoner at the Day prefixed by such Writs. Also it seems clear, [p] That it is no excuse for not obeying a Writ of *Habeas Corpus ad subjiciendum*, that the Prisoner did not tender the Fees due to the Gaoler: Also [q] it seems to be the better Opinion, That the want of such a Tender is no Excuse for not obeying a Writ of *Habeas Corpus ad faciendum & recipiendum*; however [r] it is certain, That if the Gaoler bring up the Prisoner by vertue of such *Habeas Corpus*, the Court will not turn him over till the Gaoler be paid all his Fees, [s] nor, as some [t] say, till he be paid all that is due to him for the Prisoner's Diet, for that a Gaoler is compellable [u] to find his Prisoner Sustenance; but this is denied by others. [x]

[a] F. N. B. 62. o. 230. e. 63. b. 67. b. 13. h. 14. a.
[b] F. N. B. 3. e. 13. a.
[c] F. N. B. 12. e.
[d] Rastals Entries, 83. b. pl. 4.
F. N. B. 20. b. 153. d. 243. d.
[e] F. N. B. 12. e. 13. a.
Rastal's Entries, 83. b. pl. 4.
[f] F. N. B. 153. b. c. 243. d.
[g] F. N. B. 20. a. b.
[h] Moor, 677. pl. 921.
Yelv. 32.
1 Keb. 93.
[i] 1 Mod. 44.
[k] 2 Jon. 47.
[l] 1 Rol. Rep. 315.
[m] F. N. B. 13. b. 14. a.
Fitz. Replevin, 31.
43 Ed. 3. 26.
Fitz. Process, 168.
Action sur le Case, 39.
[n] Burgh & Blunt, Hil. 3 Geor.
[o] 6 Mod, 137.
See Book 1. Ch. 83. S. 26.
[p] 1 Keb. 272. pl. 57.
[q] March 89. 1 Keb. 280. pl. 79.
2 Jon. 178.
Contra
1 Keb. 566. pl 11.
[r] 2 Jon. 178.
[s] 2 Rol. Abr. 32. B.
[t] 1 Rol. Rep. 338, 339.
Contra 2 Rol. Abr. 32. B.
[u] Co. Lit. 295. a.
9 Co. 87. b.
[x] Pl. Com. 68. a.
2 Rol. Abr. 32. B.

Sect. 32. Alſo it ſeems, That the Court of King's Bench, which has a general [a] Superintendency over all Perſons who are in any reſpect Miniſters of Juſtice, may award an Attachment againſt any Gaoler uſing a Priſoner barbarouſly and inhumanly; yet it is ſaid, [b] That a Gaoler is no way puniſhable for keeping a Debtor in Irons. And it ſeems agreed at this Day, That a Gaoler ſhall not be puniſhed in the Manner above-mentioned, for the bare Eſcape of a Perſon in his Cuſtody by Civil Proceſs; but that the Party grieved by ſuch Eſcape ought to take his Remedy by Action.

Sect. 33. As to the fourth Point, *viz.* In what Caſes any Perſon whatſoever is puniſhable in the Manner above-mentioned; it ſeems, That even Peers of the Realm, whether Spiritual or Temporal, are liable to ſuch Puniſhment for ſome Contempts, as for reſcuing [c] a Perſon arreſted by due Courſe of Law, or for proceeding in a Cauſe againſt [d] the King's Writ of Prohibition, or for diſobeying other [e] Writs, wherein the King's Prerogative, or the Liberty [f] of the Subject are nearly concerned; but it doth not [g] ſeem clear that it is a certain general Rule, that a Peer is puniſhable in this manner for Diſobedience of all Writs whatſoever; and it ſeems [h] certain, That no Peer is liable to an Attachment for not appearing on a Jury; therefore it ſeems, That what is ſaid [i] in ſome Books in general, That an Attachment lies againſt Peers, for Contempts ought to be underſtood of ſuch only as are of an enormous [k] Nature, as thoſe above-mentioned, and others [l] of the ſame kind, about which it is difficult to lay down any certain particular Rules; however it is certain, that all other Perſons are liable to an Attachment for Contempts, all the particular inſtances whereof it would be endleſs to enumerate, and therefore I ſhall only take notice of the moſt remarkable, which ſeem reducible to the following Heads.

1. Contempts of the King's Writs.
2. Contempts in the Face of a Court.
3. Contemptuous Words, or Writings, concerning the Court.
4. Contempts of the Rules or Awards of the Court.
5. Abuſes of the Proceſs of the Court.
6. Forgeries of Writs, and other Deceits of the like kind, tending to impoſe on the Court.

Sect. 34. As to the firſt Particular, *viz.* Where Perſons are puniſhable in the Manner above-mentioned for Contempts of the King's Writs; it ſeems that it may reaſonably be argued, That all ſuch Writs, being in the King's Name, and importing ſome lawful Command or Prohibition from him, which every Subject is in Duty bound to obey, every Diſobedience [m] of any of them being a Contempt of the King's Authority, is, in ſtrictneſs, puniſhable in the manner above-mentioned, if the Court, in Diſcretion, ſhall think fit ſo to proceed: Yet it doth not ſeem to have been uſual for the Court to proceed in this manner for a bare Nonfeſance, in not performing the Command of the firſt Writ in any Caſe whatſoever. But [n] it ſeems clear, That an Attachment lies of Courſe for the Non performance of the Demand of a *Pluries*, which may in ſome Caſes, if not in all, be taken out together with the *alias*, at the ſame time with the firſt Writ: Alſo it ſeems, That the Court may in any ſpecial Caſe, in which it ſhall ſeem proper, make a Rule to compell the Party to whom the firſt Writ is directed, to execute it; and, if

[a] 6 Mod. 137. [b] 2 Inſt. 381. 2 Rol. Abr. 806. c. 1. 807. pl. 2. 3 Co. 44. [c] Fitz Proceſs. 114, 161 Retorn de vicount, 74. 1 H. 5. 14. a. Dyer 212. pl. 36. 27 H. 8. 22. b Crompton Jur. 14. a. [d] 21 Ed. 3. 3. pl. 7. [e] 2 R. A. 228. Letter A. 234. pl. 3. 8 Ed 4. 17. a Vide 25 Ed. 3. Ch. 6. F. N. B. 47. c Fitz. quare non admiſit 7 Bro. Contempt, 5. 8 Co. 60. [f] 11 H. 4. 15. b. Fitz. Withernam, 4. [g] 21 Ed. 3. 3. pl. 7. F. N. B. 33. e [h] Dyer, 319. pl. 98. [i] Fitz. Proceſs, 198. Cro. El. 170. 2 Rol. Abr. 234. pl. 3. Bro. Contempt, 3, 19. 6 Co. 54. a. Finch, 355. [k] Dyer, 315. pl. 98. Hob. 61. 21 Ed. 3. 59. b. Raſtal 313. pl. 19, 20. 29 Aſſ. pl. 33. [l] Cro. El. 503, 170. 1 Rol. Abr. 220. pl. 12. 221 pl. 13. 3 Inſt. 142. [m] 1 Mod. 44. 5 Mod. 314, 315. Fitz. quare non admiſit 7 [n] Fitz. Suggeſtion, 25. 43 Aſſ. 39. Raſtal. 457. pl. 7. Finch. 237. 11 H. 4. 86. Fitz Count. 34. Suggeſtion, 25. F. N. B. 68. e.

Supra Sect. 27.

if ſuch Rule ſhall be diſobeyed, there can be no doubt but that the Court may proceed againſt ſuch Diſobedience in the ſame manner as they uſually do againſt the Diſobedience of any other Rule: Alſo it ſeems [a] to be common Practice to grant Attachments upon Affidavits of Contempts to the King's Writs, by acting contrary to the Purport of them. Alſo there can be no doubt, but that if a Sheriff ſhall in any Caſe return to the Court, That a Perſon arreſted, [b] or Goods ſeiſed, [c] or Poſſeſſion of Lands delivered [d] by him, by Vertue of the King's Writ, were reſcued or violently taken from him, *&c.* the Court may award an Attachment againſt the Reſcuers. Alſo it is certain, That the Court hath, in ſome Caſes, awarded an Attachment upon Affidavits of a Reſcous, where the Officer hath not returned one; yet this was anciently [e] looked on as irregular, and of late the Court has refuſed to grant an Attachment in any Caſe for a Reſcous, unleſs the Officer will return it; for that it hath been found by Experience, that Officers will often take upon them to ſwear a Reſcous, where they will not venture to return one.

[a] F. N. B. 165 B. 166. B, C, D. 270. C. 173. E. 174. A, B. 175. B. Fitz Suggeſtion, 9. 8 Co. 60. Supra. Sect. 33.

[b] Fitz. Attachment, 1. Proceſs, 56. Fitz. Retorn de vicount, 74. 37 H. 6. 27. b. Dy. 212. pl. 36. 2 Jon. 39.

[c] Fitz. Attachment, 5. 38 Ed. 3. 9. b.

[d] Salk. 321, 7.

[e] Fitz. Suggeſion, 25.

Sect. 35. As to the ſecond Particular, *viz.* Where Perſons are puniſhable in the Manner above-mentioned, for Contempts in the Face of the Court; it ſeems clear, That all Perſons are puniſhable in this manner, not only for making an actual Breach of the Peace, but alſo for any heinous Miſdemeanour in the Face of the Court; as [f] for giving falſe, trifling, and contradictory Anſwers upon an Examination in Court concerning one's Ability to be Bail for another, in an Action depending in the Court, or concerning any other ſuch like Matter in queſtion before the Court, and to be determined by the Examination of the Parties; or [g] for any contemptuous Behaviour towards any Judge in the Face of the Court, as by charging him with Injuſtice, and praying for an Information againſt him, *&c.*

[f] Cro. Car. 146 7 H. 6. 25. pl. 10.

[g] Raym. 376.

Sect. 36. As to the third Particular, *viz.* Where Perſons are puniſhable in the Manner above-mentioned, for contemptuous Words, or Writings, concerning the Court; it ſeems needleſs to put any Inſtances of this kind, which are generally ſo obvious to common Underſtanding, and therefore I ſhall only obſerve, That ſometimes Attachments have been granted for contemptuous Words concerning the Rules of the Court, without making any Rule to ſhew Cauſe why ſuch Attachments ſhould not be granted, becauſe it would be vain to ſerve him with a ſecond Rule who has deſpiſed the firſt.

Salk. 84.

Sect. 37. As to the fourth Particular, *viz.* Where Perſons are puniſhable in the Manner above-mentioned, for Contempts of the Rules or Awards of the Court; There is nothing more frequent than to proceed in this Manner for Contempts of this kind; as where [f] a Defendant in an Action of Account being adjudged to account before Auditors, refuſes to do it, unleſs they will allow ſuch an Acquittance, which was diſallowed by the Court before; or [g] where one who has ſubmitted to an Arbitration by Rule of Court, being afterward perſonally ſerved with a Copy of the Award, and required to perform it, refuſes to do it; or where one, refuſing to pay the Coſts taxed by the Maſter, for that ſuch a Taxation is, in Judgment of Law, a Taxation by the Court: But it ſeems, That generally an Attachment is not grantable for Diſobedience of any Rule, unleſs the Party have been perſonally ſerved with it; nor for Diſobedience of a Rule at *Niſi Prius*, unleſs it

43 Aſſ. pl. 39

[f] Fitz. Imprſonment, 18. and Vide Fitz. Accompt, 23, 84, 109, 112. 29 Ed. 3 35. b.

[g] 1 Mod. 21. Salk. 71. pl. 4. 83 pl. 1. Vide 9 & 10 Guil. 3. 15.

Salk. 84. be made a Rule of Court, nor for Diſobedience of a Rule made by a Judge at his Chamber, unleſs it be entred.

Sect. 38. As to the fifth Particular, *viz.* Where Perſons are puniſhable in the Manner above-mentioned, for Abuſes of the Proceſs of the Court, There are ſo many inſtances of this kind that it would be in vain to go about to enumerate them all, and therefore I ſhall only take notice of ſome of the Principal of them, as,

Hob. 264. *Sect.* 39. Firſt, The taking out ſuch Proceſs without any Colour of Right to it; as where one ſues out Execution without any Judgment to warrant it, *&c*, or where a Woman brings an Appeal [a] of the Death of her Husband, whom ſhe knows to be alive.

[a] 8 H. 4. 17. Fitz. Coron. 73.

Sect. 40. Secondly, The making uſe of ſuch Proceſs as a Stale to help the Juriſdiction of an inferior Court; as where one arreſts another by a *Latitat*, in order by that means to bring him within the Limits of an inferior Court, and when he has got him there drops the *Latitat* and proceeds in the inferior Court.

Style Rep. 239, 343.

Sect. 41. Thirdly, Making uſe of ſuch Proceſs in a vexatious manner; as where a Perſon who has brought an Action in one Court, does afterwards ſue the ſame Defendant, for the very ſame Cauſe, in another Court, while the firſt Action is ſtill depending, in which Caſe the Defendant ſeems to have an Election either to move for an Attachment, [b] or to bring an Action [c] on the Caſe for ſuch a vexatious Proceeding againſt him.

[b] Fitz. Corpus cum Cauſa, 3. 14 H. 7. 6. b. 7. a. 6 Co. 60. a. Savil. 14.

[c] 7. H. 6. 45. a.

Sect. 42. Fourthly, Making uſe of ſuch Proceſs any other way to ſerve the purpoſes of Oppreſſion or Injuſtice; as where [d] one arreſts another at my Suit, without my Privity, in order to make ſome undue Advantage from him, *&c.*

[d] Hob. 264. Dyer, 249. pl. 84. Vide 8 El. 2.

Sect. 43. As to the ſixth Particular, *viz.* Where Perſons are puniſhable in the Manner above-mentioned for forging of Writs, and other Deceits of the like kind, tending to impoſe on the Court; nothing can be more frequent than to proceed in ſuch manner for Offences of this kind, as for altering [e] the *Teſte* of Writs, or for filling [f] them up after they are ſealed, or [g] for bringing groundleſs Actions, in order to intitle the Parties to the Privilege of the Court, or for getting [h] Judgment in Ejectment, by Affidavit of the Service of a Declaration on one who was procured to perſonate the Tenant, or for any ſuch like Practices.

[e] Dyer, 241, pl. 50. 244. pl. 58.

[f] 6 Mod. 310

[g] Dyer, 245. pl. 61. Bro. Privilege, 43.

[h] 6 Mod. 16. Savil. 31.

CHAP.

CHAP. XXIII.

Of Appeal.

BEFORE we examine the Nature of ſuch Proceſs, as is grounded on an Appeal, Indictment, or Information, it may not be improper, firſt to conſider the Nature of each of theſe in Particular. And firſt of Appeals, of which there are two ſorts,

1. By an Innocent Perſon.
2. By an Offender confeſſing himſelf Guilty, who is commonly called an Approver.

Sect. 1. And Firſt, Of an Appeal by an Innocent Perſon, which is the Party's private Action; proſecuting alſo for the Crown, in reſpect of the Offence againſt the Publick, which he may do two ways, Finch of Law, 310, 311. Plow. Com. 476.

1. By Writ.
2. By Bill.

Sect. 2. As to the Writ of Appeal, I ſhall only take Notice in this Place, That it is an Original iſſuing out of Chancery, and returnable in the King's Bench only; and for the Form of it I ſhall refer the Reader to the latter part of this Chapter, wherein I ſhall endeavour to ſhew for what Defects it may be abated.

Sect. 3. Alſo I ſhall refer the Reader to the ſame Place, for the Form of a Bill of Appeal, and ſhall not here take any farther Notice of it, than by obſerving that it muſt contain greater Certainty than a Writ of Appeal, and is in the Lieu both of the Writ and Declaration, and ſhewing before what Courts, and againſt whom it may be proſecuted.

Sect. 4. And firſt, There is no doubt [a] but that any Appeal may be ſued by Bill in the King's Bench againſt any Perſon *in cuſtodia Mareſchalli*, either by an actual Commitment, or by having Bail filed for him in that Court; but [b] not againſt one who is mainpriſed *de die in diem*, for that ſuch a one cannot be ſaid to be *in cuſtodia Mareſchalli*. And it hath been reſolved, [c] That if the Appellee be arraigned and tried the ſame Term, there is no neceſſity to file the Bill againſt him. Alſo [d] it ſeems clear, That if a Defendant appear in the ſaid Court on a void Writ of Appeal, he may be committed to the Marſhalſey, and then declared againſt *in cuſtodia Mareſchalli*; but where a Defendant appears on a Writ not void, but voidable only, as for the want of an Addition, *&c.* it was once [e] holden, That he could not be committed, nor declared againſt *in cuſtodia Mareſchalli*; but ought to be diſcharged. But the contrary hereto ſeems to be now ſettled in the Caſe of *Reeves* [f] againſt *Trundal*, who, appearing in the Court on a Writ of Appeal of Death, demanded Oyer of

[a] Cro El. 605, 695. S. P. C. 64. Lerters C. D. H P. C. 179.
[b] 4 Inſt. 180. 1 Bulſt. 74.
[c] 1 Jo 425. Cro. Car. 532. 1 Rol. Ab. 536. K.
[d] Cro. El. 694, 695.
[e] Cro. El. 605, 695.
[f] Paſchæ, 3. Georg.

Like Case between Smith and Bowen, Mich. 7 Annæ.

of the Writ, and pleaded in Abatement the want of an Addition; and thereupon the Court abated the Writ, and suffered him to be arraigned by Bill *in custodia Mareschalli*: And surely this cannot but seem more reasonable than to suffer a Prisoner under so heavy an Accusation, to which he is still liable, to go at large without a Trial; neither do I find any reason given why a Prisoner appearing on a voidable Writ, should have a greater Advantage than on a void one.

Keilw. 152, b. pl. 4.

Sect. 5. Secondly, It is also holden, That an Appeal may be commenced before Justices in Eyre, which, as I suppose, must be intended of an Appeal by Bill, for that all Writs of Appeal must be returnable in the King's Bench.

2 Inst. 418, 420.

Sect. 6. Thirdly, Also it seems clearly to follow, from the Purport of the Statute of *Westminster*, 2. Ch. 29. That Bills of Appeal may be commenced and determined before Justices, specially assigned, in special Cases, and for certain Causes, to hear and determine them.

[a] Bro. Appeal, 11, 19, 51, 123. Dyer, 201. pl. 67. S. P. C. 64. Letter C. H. P. C. 148.

Sect. 7. Fourthly, It is certain, [a] That Commissioners of Gaol-delivery may receive a Bill of Appeal against any Prisoner of the Gaol which they are authorised to deliver. Also it is generally holden, That they may receive such a Bill against a Person who has been let to Bail by them, but not against one who has been let to Mainprise. And it hath been resolved, That if part of the Accomplices to the same Felony be in the Prison which such Justices are to deliver, and the others be not in it, the Justices shall receive an Appeal against them all, which, after the Trial of those that are in the Prison, shall be removed into the King's Bench, where the others shall be proceeded against. But these three last Points, having been already more largely considered, Chap. 6. Sect. 5. I shall refer the Reader to what is there said concerning them.

Vide Supra. fol. 28, 29, 30. Dy. 99. pl. 62.

Sect. 8. Fifthly, It seems to follow, from the Purport of the Statutes which have been generally construed to authorize Justices of Assise to deliver Gaols without any special Commission of Gaol-delivery, that they may receive Bills of Appeal in the same manner as Commissioners of Gaol-delivery may.

[b] Coro. 95. [c] Vide S P. C. 65. Letter A 2 Inst. 420. H. P. C. 179. 2 *H* 4. 19. pl. 12. Bro. Appeal, 18. [d] 44 Ed. 3. 44. pl. 57. See Bro. Appeal, 11.

Sect. 9. Sixthly, It seems to be holden in *Fitzherbert*'s Abridgment, [b] That Justices of Peace have Power to receive Appeals by Vertue of 34 *Ed.* 3. 1. which enacts, That they shall hear and determine all manner of Felonies and Trespasses in the same County, *&c.* But there is much greater Authority [c] for the contrary Opinion; and the Case in the [d] *Year-Book*, in the Abridgment whereof the said Opinion of *Fitzherbert* is insinuated, is plainly mistaken, for that it makes no manner of mention of Justices of Peace, but only of Justices of Gaol-delivery; to which may be added, That the above-mentioned Statute of 34 *Ed.* 3. 1. which empowers Justices of Peace to hear and determine Felonies, *&c.* is express, That they shall have Power so to do at the King's Suit, which must be either taken to exclude the Suit of the Party, or to signify little or nothing.

[e] See Ch. 9. Sect. 39, 40, 41. [f] See Ch 9. Sect 42. [g] H. P. C. 180. S. P. C. 65. a. 1 Inst. 74. a. b. Vide infra, Sect. 28.

Sect. 10. Seventhly, It is certain, That an Appeal may be commenced [e] by Bill, before the Sheriff and Coroner, and removed [f] from them into the King's Bench, by *Certiorari*, as hath been more fully shewn, Chap. 9.

Sect. 11. Eighthly, It seems to be agreed, [g] That an Appeal by the Course of the Civil Law, in Nature of a Bill of Appeal by the Common Law, may be sued before the Constable and Marshal for some Felonies

Felonies done out of the Realm, in relation whereunto it is enacted by 1 *H.* 4. 14. as followeth, *For many great Inconveniencies and Miſchiefs that often have happened by many Appeals made within the Realm before this time, it is ordained from henceforth, That all Appeals to be made of things done within the Realm, ſhall be tried and determined by the good Laws of the Realm: And that all Appeals to be made of things done out of the Realm, ſhall be tried and determined before the Conſtable and Marſhal of* England *for the time being.*

Sect. 12. In the Conſtruction of this Statute, it ſeems to have been agreed, [a] That if any of the King's Subjects kill any other of his Subjects in any foreign Realm, the Wife, or Heir of the Deceaſed may have an Appeal of his Death, before the Conſtable and Marſhal, who ſhall proceed according to the Civil [b] Law, and give Sentence by the Teſtimony of Witneſſes, or Combat: From whence it follows, [c] That no ſuch Sentence can corrupt the Blood of the Appellee, for that ſuch Corruption can only be cauſed by a Judgment by courſe of the Common Law. Alſo [d] it ſeems to be clear, That no ſuch Appeal can be proſecuted before the Marſhal alone without a Conſtable.

[a] S. P. C. 65. Letter B. 1 Inſt. 74. a. 13 H. 4. 5. a.
[b] 4 Inſt. 155. 1 Inſt. 74, 391. b.
[c] Supra Ch. 4. Sect. 10. Bro. Juriſdict. 103.
[d] See B. 1. Ch. 37. Sect. 8. and Ch. 4. of this Book Sect. 10. and 1 Inſt. 391. a.

Sect. 13. It hath been holden, [e] That if a Man die in *England*, of a Wound given him in a foreign Realm, he may be appealed by the intent of this Statute, before the Conſtable and Marſhal, for that it is certain, That he cannot be tried by the Common Law; and it cannot be thought the meaning of the Statute in reſtraining the Civil Law, in Caſes within the Conuſance of the Common, to reſtrain it alſo in Caſes which the Common Law had nothing to do with, and which were properly cogniſable by the Civil Law, and by that only; for the only end of ſuch a Conſtruction would be to cauſe a Failure of Juſtice.

[d] See Ch. 4. Sect. 8. Letter f. Hutt. 3.
[e] S. P. C. 65. Letter B. 1 Inſt. 74, b.

Sect. 14. It is farther enacted by the ſaid Statute of 1 *H.* 4. 14. *That no Appeals be from thenceforth made, or in any wiſe purſued in Parliament, in any time to come.*

B. 1. Ch. 31. Sect. 11.

Appeals conſidered, as to the Matter of them, are of two kinds.

1. Not Capital.
2. Capital.

Sect. 15. And firſt, of thoſe not Capital, whereof there were anciently ſeveral kinds, as Appeals *de pace*, *de plagis*, and *de Impriſonamento*, as well as Appeals of *Mayhem*; but the former of theſe having been out of uſe, and turned to Actions of Treſpaſs, for theſe many hundred Years, I ſhall only conſider the Nature of an Appeal of *Mayhem*; for the better Underſtanding whereof, I ſhall endeavour to ſhew,

Fleta Lib. 1. cap. 41. Bract. Lib. 3. cap. 25. 4 Inſt. 182. 1 Inſt. 126. b.

1. Of what *Mayhems* it lies.
2. What ought to be the form of the Writ, Bill, and Declaration.
3. What Defence may be made by the Appellee.
4. How the *Mayhem* ſhall be tried, and where the Trial ſhall be peremptory.

Sect. 16. As to the firſt Point, *viz.* Of what *Mayhems* an Appeal lies; I ſhall take it for granted, That notwithſtanding every [f] Hurt whatſoever done to a Man's Body, whereby he is leſs able in Fighting, may perhaps, properly enough, in a large Senſe, be called a *Mayhem*, and [g] will certainly ſubject the Perſon who occaſion'd it to the Payment

[f] See B. 1. Ch. 44.
[g] 2 Jo. 205. Hob. 134

of Damages, in an Action of Treſpaſe by the Party grieved, whether it were malicious, or happened through Accident or Miſadventure; yet [a] an Appeal of *Mayhem* cannot be maintained for any ſuch Hurt, unleſs it were accompanied with ſome evil Intention in the Perſon who cauſed it; for ſurely the Law, in requiring that the Word Felony be made uſe of in every ſuch Appeal, (as will be more fully ſhewn under the next Point) cannot imply leſs than that the Fact muſt be attended with ſome odious Circumſtances. Yet it ſeems clear, That if a Man ſtriking at another with ſuch an evil Intent, as would ſubject him to an Appeal of *Mayhem*, if the Perſon ſtruck at ſhould be maimed, ſhall happen to miſs him, and ſtrike a third Perſon, and maim him, he is liable [b] to an Appeal of *Mayhem* at his Suit, whether he had any kind of Ill-will againſt him or not.

[a] 13 H. 7. 14. pl. 5.

[b] Bro. Appeal, 157. 13 H. 7. 14. pl. 5. See B. 1. Ch. 31. Sect. 41.

As to the ſecond Point, *viz.* What ought to be the Form of the Writ, Bill, and Declaration, I ſhall only take Notice in this Place,

Sect. 17. Firſt, That the Word *Mayhemiavit* [c] is ſo neceſſary in every ſuch Writ, Bill, or Declaration, that it can be ſupplied by no other Word of the like Senſe, nor by any Circumlocution whatſoever.

[c] 1 Inſt. 126. b.

Sect. 18. Secondly, That in every ſuch Writ, Bill, or Declaration, the *Mayhem* muſt [d] be laid to have been done *Felonicè*, and yet the Defendant is not at this Day ſubject to the loſs of Member from ſuch an Appeal, as anciently [e] he was, in which reſpect the Law ſeems to have required the uſe of the Word *Felonicè*.

[d] 1 Inſt. 127. a. Bro. Appeal, 72, 86, 143.

[e] See B. 1. Ch, 44. Sect. 3. 1 Inſt, 127. a Pulton 17. a.

Sect. 19. Thirdly, [f] That it is in the Election of the Plaintiff to declare againſt him who actually gave the Wound, as the Principal Offender, and againſt thoſe who abetted him, as Acceſſories; or elſe to declare againſt them all as Principals.

[f] 41 Aſſ. 16. 40 Aſſ. 9. Fitz. Treſpaſs, 199. Coron. 11, 228. S. P. C. 44. Letter F. Contra Bro. Appeal, 154.

Sect. 20. Fourthly, That if a Man bring a Writ of Appeal of *Mayhem*, and count of Battery, he abates the Writ, becauſe the Writ ſuppoſes no Battery, and therefore is not purſued by ſuch a Declaration as it ought to be. But for other Particulars relating to the Form of Appeals, I ſhall refer the Reader to the Books [g] of Entries.

Bro. Appeal, 60. Fitz. Coron. 110. [g] Coke Entries, 50, 51. Raſtel's Entries, 45, 46.

Sect. 21. As to the third Point, *viz.* What Defence may be made by the Appellee; being able to find little or nothing Particular concerning Pleas in Abatement by ſuch an Appellee, I ſhall refer the Reader for that Matter, to what is ſaid concerning Pleas in Abatement of Appeals in general, in the latter part of this Chapter, and only take notice in this Place of the following Particulars.

1. Where a Recovery in another Action may be pleaded in Bar of an Appeal of *Mayhem*.

2. Where and in what Manner *ſon Aſſault demeſne*, and other Matters of the like Nature may be ſo pleaded.

3. Whether an Arbitrament, or an Accord with Satisfaction, may be ſo pleaded.

4. What kind of Releaſe may be ſo pleaded.

5. Where a Nonſuit in a former Action.

6. That [h] the Appellee cannot wage his Law.

[h] 1 Inſt. 295. a. Vide 48 Ed. 3, 6. Fitz. Ley, 36.

Sect. 22. As to the firſt of theſe Particulars, *viz.* Where a Recovery in another Action may be pleaded in Bar of an Appeal of *Mayhem*; It

It ſeems clear, That notwithſtanding a Recovery [a] in an Appeal of *Mayhem* cannot be pleaded in Bar of an Action of Treſpaſs for the Battery with which the *Mayhem* was accompanied, becauſe [b] in ſuch an Appeal the *Mayhem* only is conſidered diſtinct from the Battery; yet [c] a Recovery in an Action of Treſpaſs, for an Aſſault, Battery, and Wounding, may be pleaded in Bar of an Appeal of *Mayhem*, appearing by proper Averments to be brought for the ſame Treſpaſs; for it ſhall be intended that the Jury in giving Damages for the Wounding, included the Maim, and no Man ſhall be liable to double Vexation for one and the ſame thing; yet [d] in ſuch a Caſe if the Appellee ſhall make it appear, by a ſpecial Replication, that the Maim hath been occaſioned ſince the Verdict in the Action of Treſpaſs, by ſome ſubſequent Mortification, Dryneſs, or ſhrinking of the Part, by reaſon of the Wound, perhaps he may avoid ſuch Plea by ſuch ſpecial Matter; but the Court will not intend it unleſs it be ſpecially ſhewn.

[a] 22 Aſſ. pl. 82. Fitz. Coro. 110, 182. 4 Co. 43. 43 Aſſ. 39.
[b] Bro. Appeal, 60.
[c] 4 Co. 43. a. 1 Leon. 318, 319
[d] 43 Aſſ. pl. 3. 1 Leon. 318, 319.

Sect. 23. As to the ſecond Particular, *viz.* Where, and in what manner *ſon Aſſault demeſne*, and other Matters of the like Nature, may be pleaded in Bar of an Appeal of *Mayhem*; It ſeems clear, that it is a good Plea in Bar of ſuch an Appeal, That [e] the Plaintiff firſt aſſaulted the Defendant, and would have beaten and killed him, unleſs he had defended himſelf againſt him, *&c.* Or that [f] the Plaintiff firſt aſſaulted the Defendant, who fled from Place to Place, till he was reduced to a neceſſity of Fighting, *&c.* And in ſome Books [g] it ſeems to be holden in general, That *ſon Aſſault demeſne* may be pleaded in Bar of any ſuch Appeal without any ſuch ſpecial Circumſtances in favour of the Defendant: Yet how far a trifling Aſſault may juſtify a grievous *Mayhem*, as the cutting off of a Leg, or Hand, *&c.* unleſs it happened accidentally in the Scuffle, without any barbarous Intention, may well deſerve to be conſidered. However [h] it ſeems clear, That if the Maim in the Declaration be laid in *A.* and the Defendant juſtify the ſame Maim, by reaſon of an Aſſault made upon him by the Plaintiff in *B.* he needs not traverſe the maiming of the Plaintiff in *A.* or in any other Place, for it is apparent, that the ſame Maim could not be given but in one and the ſame Place, and therefore being juſtified in any one Place it is well anſwered. Alſo it ſeems [i] clear, That a Man cannot juſtify the maiming another in the Defence of his Poſſeſſions, but only in the Defence of his Perſon. Alſo it is certain, [k] That a Defendant cannot give in Evidence on the general Iſſue, that the Plaintiff firſt aſſaulted him, but muſt ſpecially plead it.

[e] 2 Rol. Ab. 547. letter F. Raſtals Entries, 45.
[f] 2 Rol. Ab. 112. letter B. 25 Ed. 3. 42. pl. 21. See B. 1. Ch. 60. Sect. 23.
[g] 27 Ed. 3. 94. pl. 1. 41 Aſſ. pl. 21. Fitz. Coro. 142. 1 Keb. 921. 1 Syd. 246.
[h] 41 Aſſ. pl. 21. Bro. Viſne, 74. Bro. Traverſ. 173.
[i] 2 Rol. Ab. 548. pl. 5. 2 Inſt. 316.
[k] 2 Inſt. 282, 283. 2 Inſt. 316.

Sect. 24. As to the third Particular, *viz.* Where an Arbitrement, or Accord with Satisfaction, may be pleaded in Bar of an Appeal of *Mayhem*, it clearly ſeems to be admitted in the Pleadings, [l] in ſome Books, and is ſaid [m] to have been adjudged in a Roll, not printed, That notwithſtanding every ſuch Appeal muſt ſuppoſe the Fact to have been done feloniouſly, yet inaſmuch as at this Day it ſubjects not the Appellee to the Loſs of Member, but only to Damages, *&c.* as an Action of Treſpaſs doth, it may be well barred either by an Arbitrament, or an Accord with Satisfaction executed.

[l] 35 H. 6. 39. b. 30. a. 6 H. 7. 1. pl. 1. Fitz. Coro. 63. 6 Co. 44. a.
[m] 9 Co. 78. b.

Sect. 25. As to the fourth Particular, *viz.* What kind of Releaſe may be pleaded in Bar of an Appeal of *Mayhem*; There can be no doubt, but that in a Releaſe of all manner of Appeals, [n] or a Releaſe of all manner of Actions, or a Releaſe of all manner of Demands, [o] might always be pleaded in Bar of ſuch an Appeal; and that a Releaſe of all manner

[n] Littleton, Sect. 501.
[o] Littleton, Sect. 508.

manner of Actions [a] perſonal may alſo be pleaded in Bar of it at this Day, becauſe the Appellant ſhall recover in it nothing but Damages; but while it ſubjected the Appellee to the loſs of Member, it ſeems queſtionable, whether it could be barred by a Releaſe of Actions perſonal, becauſe it ſeems to have been then eſteemed an Action of a higher Nature, and not properly to have come under the Notion of a perſonal Action.

[a] 1 Inſt. 288

1 Inſt. 288.

Sect. 26. As to the fifth Particular, *viz.* Where a Nonſuit in a former Action may be pleaded in Bar of an Appeal of *Mayhem*; It ſeems clear, [b] That a Nonſuit in any ſuch Appeal, after the Plaintiff hath appeared to it, may be pleaded in Bar of any other. Alſo [c] it ſeems to have been adjudged, That it may alſo be pleaded in Bar of an Action of Treſpaſs brought for the ſame Maim, and alſo for the Battery with which it was accompanied; yet howſoever the Law may ſtand in relation to this matter; if ſuch Action be brought for the Battery only, without mentioning the *Mayhem*, I ſee not how it can be barred by ſuch a Nonſuit, becauſe it is generally holden, That in an Appeal of *Mayhem* no Conſideration [d] can be had of the Battery, but only of the *Mayhem*; and if ſo, it ſeems ſtrange, that a Nonſuit in ſuch an Appeal ſhould bar an Action of a different Nature, brought for a Matter which the Appeal had nothing to do with. However [e] it ſeems clear, That a Nonſuit in an Action of Treſpaſs is no Bar of an Appeal of *Mayhem*. Alſo I take it for granted, That a Nonſuit in an Appeal of *Mayhem*, before the Plaintiff hath appeared to it, is not [f] a Bar of any other Appeal, or Action, becauſe the Writ, for what appears to the contrary, might be purchaſed by a Stranger, in the Name of the Plaintiff.

[b] 43 Aſſ. pl. 39. 40 Aſſ. pl. 1. 1 Inſt. 139. a Fitz. Coron. 214.

[c] 43 Aſſ. pl. 39. Bro. Appeal, 138.

[d] Bro. Appeal, 60. Fitz. Coron. 110, 182. Vide Supra. Sect. 22.

[e] Bro. Appeal, 138, Fitz. Ley. 36

[f] 1 Inſt. 139. a.

Sect. 27. As to the fourth Point, *viz.* How the *Mayhem* ſhall be tried, and where the Trial ſhall be peremptory; There [g] is no doubt but that if the Defendant put it in iſſue whether the Plaintiff were maimed or not, and pray that the Part which was hurt be viewed by the Court, in order to have it adjudged on ſuch View, whether there be any *Mayhem* or not, the Court may take a View of the Part, and on ſuch View determine the Matter; or if there remain a doubt upon the View, may [h] award a Writ to the Sheriff to return ſome able Phyſicians and Surgeons, for the better Information of the Court. But it ſeems, That the Court cannot proceed to ſuch a Trial by their View, unleſs the Defendant pray it: And in ſuch Caſe it ſeems, [i] That they are not bound to try it in ſuch Manner, but may order a Trial by a Jury, at which it is ſaid, [k] That they may, if they think fit, order that the Jury ſhall have a view of the Wound: And becauſe the Court hath ſuch a diſcretionary Power in relation to ſuch View, it has been reſolved, [l] That the Plaintiff in the Appeal muſt appear in proper Perſon, and not by Attorney, becauſe that would put the View out of the Power of the Court. And it ſeems to be agreed, [m] That an Adjudication made upon ſuch View, is peremptory and concluſive to each Party.

[g] 28 Aſſ. pl. 5. 8 H. 4. 21. pl. 1. 2 Rol. Abr. 578. letter F.

[h] 28 Aſſ. pl. 5. Raſtal's Entries, 46. pl. 5, 6. 28 Ed. 3. 94. pl. 1.

[i] 6 H. 7. 1. pl. 1. 21 H. 7. 33. pl. 30. 21 H. 7. 40. pl. 58. 41 Aſſ pl. 27.

[k] 22 Aſſ. pl. 82. Vide 21 H. 7. 33. pl 30.

[l] 2 Inſt. 313.

[m] 6 H. 7. 1. pl. 1. 28 Aſſ. pl. 5. 21 H. 7. 33. pl. 30. 37 Aſſ. pl. 9. 26 Aſſ. pl. 32.

Sect. 28. It ſeems to be holden, That the Defendant, in an Appeal of Maim, may in ſome Caſes wage Battel; but I find no Inſtance in which Battel hath been actually waged in ſuch an Appeal.

Secondly, Of Capital Appeals there are two kinds,

1. Of Treaſon.
2. Of Felony.

Sect.

Sect. 29. And first of Appeals of Treason, which, as it is said, [a] might be sued anciently not only before the Parliament, but also before other Courts of Common Law, as well as before the Constable and Marshal, and were determinable by Battel, Verdict, or otherwise, according to the Course of the several Courts before which they were commenced. But it is certain, That such Appeals before the Parliament are taken away by 1 *H.* 4. 14. set forth more at large in the fourteenth Section of this Chapter, But I do not see any reason why Appeals of Treason, done in the Realm, before other Courts of Common Law, which had before Jurisdiction thereof, should be construed to be taken away by that Statute, which by ordaining, *That Appeals of Things done within the Realm, shall be tried and determined by the good Laws of the Realm,* cannot be intended to restrain any Appeal determinable wholly by those Laws, as all the Appeals before the Courts of Common Law seem always to have been. However, since there has been no Instance of any such Appeal, before any Court of Common Law, either since the making of the said Statute, nor for many Years before, the Law relating to such Appeals seems wholly obsolete at this Day. But as for Appeals before the Constable and Marshal, of Treasons done out of the Realm, it seems clear, That the Law in relation to them is still in Force, as it always hath been; for the said Statute of 1 *H.* 4. 14. by ordaining, *That Appeals of Things done out of the Realm, shall be tried and determined before the Constable and Marshal,* seems clearly rather to affirm than weaken their Jurisdiction in relation to such Treasons. Also it hath been adjudged, that the Statutes which ordain, That Treasons done out of the Realm shall be tried in the King's Bench, *&c.* do not take away the Jurisdiction of the Constable and Marshal, in relation to Appeals of such Treasons, as hath been more fully shewn Chap. 4. Sect. 9. And agreeably hereto, an Appeal of Treason, supposed to have been committed beyond Sea, was actually commenced in the seventh Year of the Reign of King *Charles* the First, by *Donald* Lord *Rea*, against *David Ramsey*, Esq; before the Constable and Marshal, who, for want of sufficient Proof to clear the Truth of the Accusation, actually awarded, That a Duel should be fought between the said Appellant and Appellee, for the final Determination of the Matter.

[a] 3 Inst. 132 Bract. 118, 119. Fleta Lib. 1. Ch. 21. S. P. C. 78. Letter C. Contra Bro. Appeal, 46.

4 Inst. 124. H. P. C. 180. *seems contrary.*

Rushworth's Collect. Part 2. Vol. 1. from fol. 112. to 128.

Of Appeals of Felony there are four principal kinds,

1. Of Death.
2. Of Larceny.
3. Of Rape.
4. Of Arson.

But before I examine the Nature of each of these in Particular, I shall premise some Things in general concerning what Persons are capable of bringing them, as

[b] Moor 461. pl. 646. H. P. C. 183, 184. Keilw. 120. a S. P. C. 60. Letter D. See the Books under cited. Con. 45 Ed. 3. 25. pl. 36. 41 Ass. pl. 14

Sect. 30. First, That [b] the Infancy, Old Age, or other Imbecillity of the Plaintiff, is no good Objection against his bringing an Appeal, tho' it take from the Defendant the benefit of waging Battel, and in that respect put him in a worse Condition than he would be in if the Appeal were brought by a Person capable of fighting; for inasmuch as the Defendant has proper means for his Acquittal, by putting himself upon a

Trial by his Country, and the Imbecillity of the Plaintiff is wholly owing to the Act of God, and no ways leſſens the Injury complained of by him, it is not reaſonable he ſhould ſuffer any Diſadvantage from it. And agreeably hereto it ſeems to have been ſettled [a] of late times, contrary to the numerous Authorities [b] in the old Books, That the Parol ſhall not demur in an Appeal for the Nonage of the Plaintiff. Yet it is certain, [c] That an Infant muſt proſecute ſuch Suit by a Guardian; and it is ſaid, [d] That he ſhall be nonſuited for the Non-appearance of ſuch Guardian, upon Demand, at any Day whereon he is demandable, notwithſtanding an Allegation that he was not able to come by reaſon of Sickneſs, or other ſuch like Excuſe. And there [e] is a Caſe wherein the Court refuſed to inlarge the Day of ſuch Guardian's Appearance upon a Surmiſe of his Sickneſs. But notwithſtanding the Guardian be ſo neceſſary in the Proſecution of ſuch a Suit, yet if the Infant come into Court, and ſay he will relinquiſh it, and yet the Guardian will proſecute it; the Court may, [f] in Diſcretion, diſcharge ſuch Guardian, and aſſign another, for it is not reaſonable that an Infant be bound to continue a Suit againſt his Will, which demands nothing but Revenge, and will be chargeable to him.

[a] 27 H. 8. 11. pl. 25. Keilw. 120. pl. 66. S P. C. 60. D H. P. C. 183. Smith and Bowen, Mich. 7 Annæ. 2 Inſt. 320.
[b] 32 Aſſ. pl. 8. Dyer 137. pl. 24. 11 H. 4. 94. pl. 56. 13 Aſſ. pl. 10. 17 Ed. 4. 2. pl. 4. Bro. Appeal, 116. Fitz. Age. 57 83. 21 Aſſ. pl. 4. 27 Ed. 3. 83. pl. 2. 21 Ed. 3. 23. pl. 16.
[c] 27 H. 8. 11, pl. 25.
[d] Noy 88. Latch 173.
[e] Noy 88. Latch 173.
[f] 1 Rol. Abr. 288. D. Styles 456. Vide Salk. 176, 177.

Sect. 31. Secondly, [g] That a Woman may ſue any other Appeal except that of the Death of an Anceſtor; for that the Statute of *Magna Charta*, 34. which ordains, *That no Man ſhall be impriſoned on the Appeal of a Woman, for the Death of any one but her own Husband*, reſtrains not any other Appeal whatſoever.

[g] Co. Lit. 25 b. 2 Inſt. 68. Fitz. Coron. 357. S P. C. 60. F. H. P. C. 184.

Sect. 32. Thirdly, That an Ideot, [h] or Perſon born Deaf and Dumb, or one attainted [i] of Treaſon or Felony, or but outlawed [k] in a Perſonal Action (ſo long as ſuch Attainder or Outlawry continue in force) cannot bring any Appeal whatſoever.

[h] H. P. C. 183. S P. C. 60. D. 98, C.
[i] 11 Aſſ. pl. 27.
[k] 17 Aſſ. pl. 26. Bro. Appeal, 118, 146. Fitz Utlagary. 47.

And now I am more particularly to conſider the Nature of an Appeal of Death in particular, for the better underſtanding whereof, I ſhall examine the following Points.

1. Within what time it muſt be brought.
2. In what County.
3. By whom.

Sect. 33. As to the firſt Point, *viz.* Within what time an Appeal of Death muſt be brought, it is enacted by the Statute of *Gloceſter*, Ch. 9. *That an Appeal* (which from the Purport of the whole Statute hath been conſtrued [l] to be meant only of an Appeal of Death) *ſhall ſtand in effect, and ſhall not be abated for default of freſh Suit, if the Party ſhall ſue within the Year* [m] *and the Day after the Deed done.* And it hath been holden, [n] That the computation of ſuch Year and Day is to be made from the Time of the Wound which occaſioned the Death, and not from the Time of the Death; and this Opinion ſeems ſomewhat to be favour'd by the Letter of the Statute, which is, That the Party ſhall ſue within the Year and Day after the Deed done, but no Deed is done at the time of the Death, but at the time of the Wound; yet the contrary Opinion is ſettled [o] to be Law, and is certainly moſt agreeable to the Intent of the Statute, the plain Import whereof ſeems to be, That the Appellant ſhall not be adjudged to have made default of freſh Suit, unleſs he have been negligent a Year and a Day; but negligent he could not

[l] S. P. C. 62. Letter B. Infra. Sect. 48.
[m] Bro. Appeal, 37. 22 Ed. 4. 39. b.
[n] S. P. C. 63. Letter A.
[o] 4 Co. 42. b. 2 Inſt. 320. 3 Inſt. 53,

not be as to the bringing an Appeal before the Party was actually dead, becauſe till then no Appeal lay. And agreeably hereto it ſeems alſo to be ſettled, [a] That if a Perſon become Acceſſory after the Death, by receiving the Offender, an Appeal lies againſt him, at any time within the Year and Day after ſuch Receipt, becauſe till then the Appellant could not poſſibly be guilty of any Negligence as to the bringing of an Appeal againſt the Receiver. Alſo if an Appeal had been abated by the Demiſe of the King, before 1 *Ed.* 6. Ch. 7. (by which this Miſchief is provided againſt) it ſeems [b] clear, That the Appellant might have ſued a Re-attachment againſt the Appellee, within the Year and Day after ſuch Demiſe, for that he was in no default, and otherwiſe would have been without remedy.

[a] 26 Aſſ. pl. 52. 3 Inſt. 53. S. P. C. 63. Letter B. 2 Inſt. 320.

[b] 2 H. 7. 10. pl. 5. Bro. Appeal, 81, 10 Ed. 4. 13. pl. 7. Fitz. Re-attachment, 8. 7 Co. 30.

Sect. 34. It ſeems, That the Year and Day in any of the Caſes above-mentioned, are to be computed from the beginning of the Day, on which the Death, or Receipt, *&c.* happened, and not from the preciſe Minute, or Hour, becauſe regularly the Law makes no Fraction of a Day; and therefore [c] if the Party dye at any time the firſt Day of *January*, the Year ſhall end the firſt Day of *January* following.

[c] Vide 5 Co. 1 Co. Lit. 130. b. 255. A. Contra 3 Inſt. 53.

Sect. 35. As to the ſecond Point, *viz.* In what County an Appeal of Death muſt be brought; I ſhall take it for granted, That it is a local [d] Action, and conſequently cannot be brought in a foreign County. But if a Perſon happen to dye in one County of a Wound received in another, it is ſaid, [e] That the Appellant had, by the Common Law, his Election to bring his Appeal in either County, and that in every ſuch Caſe the Trial ought [f] to be at the Bar, and by a Jury returned [g] from the Body of each of thoſe Counties. But ſince the making of 2 & 3 *Ed.* 6. 24. by which it is enacted, *That in ſuch Caſes, the Party to whom Appeal of Murder ſhall be given by the Law, may commence, take, and ſue Appeal of Murder in the ſame County where the Perſon felonioufly ſtricken, or poiſoned, ſhall die*, &c. I take it for granted, That ſuch an Appeal, in the County wherein the Party died, may be tried by a Jury of ſuch County without the joinder of any other.

[d] 18 Ed. 3. 32. pl. 6. S. P. C. 63. D. Fitz. Forfeiture, 14. Dyer, 38. pl. 50, &c.

[e] 3 H. 7. 12. pl. 4. 4 H. 7. 18. pl. 10. Fitz. Coron. 59, 60. *But the Preamble of* 2 & 3 Ed. 6. 24. *ſeems contrary.*

[f] Dy. 46. pl. 8.

[g] 3 H. 7. 12. pl. 4. Finch, 410. 411. Dy. 46. pl. 8.

I ſhall not in this Place examine in what County Acceſſories to Murder are to be appealed or tried, but ſhall refer the Conſideration thereof to the Chapter concerning the Arraignment of the Principal and Acceſſory.

As to the third Point, *viz.* By whom an Appeal of Death is to be brought, I ſhall endeavour to ſhew,

1. Where it may be brought by a Wife.
2. Where by an Heir.

1. As to an Appeal by a Wife, the following Particulars ſeem moſt obſervable.

Vide Infra. Sect. 59. & 60.

Sect. 36. Firſt, She muſt be able to prove, not only that ſhe was wholly innocent herſelf of the Death complained of, but alſo that ſhe was the Lawful Wife of the Deceaſed, at the time of his Death; for it ſeems to be clearly ſettled, [h] That *N'unques accouple in loial matrimonie* is a good Plea in ſuch an Appeal, and triable by the Biſhop's Certificate, who, if the Marriage were unlawful, by reaſon of a Precontract, or Conſan-

[h] 2 Inſt. 68. 28 Ed. 3. 91. pl. 4. 50 Ed. 3. 15. 27 Aſſ. pl. 3. 11 H. 4. 14. a. b. S. P. C. 59. A B. H. P. C. 181. 1 Inſt. 33 b.

Conſanguinity, or otherwiſe, ought to certify againſt the Appellant. Alſo it is laid down as a Rule in the Old Books, [a] That a Wife may have an Appeal of the Death of her Husband *inter brachia ſua interfecti & non aliter.* By which Words, *inter brachia ſua*, according to Sir *Edward Coke*, [b] it is to be underſtood, That the deceaſed had the Wife lawfully in poſſeſſion at his Death; and if this be the meaning of them, thus much at leaſt ſeems to follow, That if the Husband were divorced from the Wife at his Death, though by a voidable Sentence, ſhe cannot maintain an Appeal. Yet it is generally holden, That a Wife who hath eloped from her Husband may have an Appeal of his Death, as ſhall be more fully ſhewn in the next Section. And *Staundforde* [c] ſeems to underſtand the import of the expreſſion above-mentioned to be this, That the Wife ought to have had the Deceaſed in her View, and to have been preſent at his Death, which is moſt certainly not neceſſary at this Day. But finding little more ſaid concerning this Matter in any other Modern Book, I ſhall leave the farther Conſideration thereof to others.

[a] Bract. Lib. 3. cap. 29. Fleta Lib. 1. cap. 35. S. P. C. 58. C.
[b] 2 Inſt. 68 217.
[c] S. P. C. 59.

Sect. 37. Secondly, In ſome Caſes a Woman may have an Appeal of the Death of her Husband, where ſhe cannot claim Dower of his Lands, as where the Husband was attainted [d] of High Treaſon at the time of his Death; for after the Attainder he was ſtill her Husband as much as before, and [e] it is the Loſs of her Husband which is the Cauſe of the Appeal. Alſo where a Woman elopes from her Husband, it is ſaid, That ſhe may have an Appeal [f] of his Death, though not a Writ of Dower; for by the Common Law ſhe might have had both; and the Statute of *Weſtminſter* 2. Ch. 34. which takes from her the later, leaves the other as before.

[d] 27 Aſſ. pl. 41. 35 H. 6. 57. b. 58. Bro. Appeal, 131. Fitz. Coro. 21 Co. Litt. 33. b. 7 Co. Calvin's Caſe, 13. b. S. P. C. 59.
[e] Bro. Appeal, 148.
[f] Bro. Appeal, 17. 1 Inſt. 33. b. S. P. C. 59. C Contra 2 Inſt. 317.

Sect. 38. Thirdly. If ſuch Appellant take another Husband either before, or pending the Appeal, ſhe puts [g] an end to it for ever; for, being given her only from a regard to her Widowhood, it cannot but ceaſe when that determines, and being once barred, it is barred for ever. And on this ground it ſeems alſo to be certain, [h] That if ſhe marry after Judgment in Appeal, ſhe cannot pray Execution. However it ſeems clear, That in ſuch a Caſe the Appellee ſhall not [i] be diſcharged without the King's Pardon: But I do not find it ſettled [k] what ought to be done with the Appellee in ſuch a Caſe. But thus much ſeems to be certain, That the King cannot proceed againſt him by way of Indictment, becauſe he is attainted already; and therefore it may probably be argued, That the Court may award Execution againſt him, either *ex Officio*, or at leaſt at the demand of the King, for otherwiſe he would ſave his Life by reaſon of the Attainder by which he is adjudged to loſe it.

[g] H. P. C. 181. S. P. C. 59. letter B. 2 Inſt. 69. 20 H. 6. 43. b Bro' Aqpeal, 148.
[h] 11 H. 4. 48. b. Bro. Appeal, 109, 112, 148 con. 21 E. 4. 73. b. *ſee alſo the Books above cited.*
[i] Bro. Appeal, 27. 3 Inſt. 209. 210. 2 H. 7. 10. pl. 5. 8 H. 4. 22. pl. 7. Fitz. Scire facias, 41. 38 H. 6. 13. pl. 26. 9 H. 7. 5. b. S. P. C. 166. letter A.
[k] 2 Leon. 83. Vide 21 Ed. 4. 72. b. 73.

Secondly, as to the Appeal of Death by an Heir, the following particulars ſeem moſt remarkable.

Sect. 39. Firſt, If the deceaſed had a Wife at the time of his Death, and ſuch Wife were wholly innocent of it, ſhe [l] only, and not the Heir, hath a Right to the Appeal, and whether ſhe bring one or wholly neglect it, and though ſhe dye or marry within the Year and Day, the Heir cannot bring an Appeal; and the reaſon hereof, according to *Keilwey*, [m] is this, That the Appeal being once out of the Blood, ſhall not

[l] Keilw. 120. pl. 65. H. P. C. 181, 182. S. P. C. 59. E 20 H. 6. 43.
[m] Keilw. 120 pl. 65.

not return to it again: Yet [a] if the Wife herſelf had a ſhare in the Guilt, the Heir may have an Appeal againſt her. But if the Petit Treaſon be pardoned by the Parliament, it ſeems, [b] That the Heir can bring no Appeal; for he cannot bring it for the Murder only, becauſe the Petit Treaſon includes in it Murder and more, and being the greater Offence drowns the leſs, and therefore the Pardon of it ſeems to pardon the Murder alſo.

Sect. 40. Secondly, Every ſuch Appellant muſt be Heir [c] general to the deceaſed, by the Courſe of the Common Law, unleſs [d] the Heir general had himſelf a ſhare in the Guilt, in which Caſe the next Heir ſhall have an Appeal againſt him. But a Father cannot [e] have an Appeal of the Death of his Son, becauſe he cannot be his Heir. Neither [f] can any one bring an Appeal of the Death of a Perſon attainted of Treaſon or Felony, except his Wife, becauſe he can have no Heir. Neither ſhall a ſpecial [g] Heir, by the Cuſtom of Borough-Engliſh, or otherwiſe, have an Appeal of the Death of his Anceſtor, becauſe he is not his next general Heir; and yet he is inheritable to ſuch of his Lands to which the Cuſtom extends, *&c.* And for the like reaſon, if the deceaſed, at the time of his Death, had two Sons, the Elder whereof is attainted of Treaſon, or Felony, neither [h] of them can have an Appeal; not the Elder, becauſe of the Attainder; not the Younger, becauſe he cannot be Heir to his Father while he has an Elder Brother; who, though he be looked upon as dead in Law to ſome Purpoſes, is yet in Truth alive, and capable of forfeiting all the Privileges belonging to the Heir, though not of taking benefit from any of them. But notwithſtanding a younger Son cannot bring an Appeal of the Death of the Father, while there is an Elder Son of the ſame Father living; yet if the eldeſt Son be by one Venter, and the middle and younger Son by another, and the middle Son be killed, the youngeſt only ſhall have an Appeal of his Death, becauſe he only is his Heir, as being of the whole Blood with him: And therefore, [i] it is no good Plea to an Appeal for the Death of a Brother, That the Appellant has *J. S.* an Elder Brother living, without ſhewing, that *J. S.* was of the whole Blood to the deceaſed.

Sect. 41. Thirdly, If an Appeal be once commenced by an Heir, who dies hanging the Suit, it ſeems to be agreed, [k] by almoſt all the Books, That no other Heir can afterwards proceed in ſuch Appeal, or commence a new one; for that this is a Perſonal Action, given to the Heir in reſpect to his immediate Relation to the Perſon killed, at the time of his Death, and like other Perſonal Actions, ſhall die with the Perſon. But ſome [l] have holden, That if the firſt Heir die within the Year and Day, without commencing an Appeal, the next Heir may bring one. But this is made a doubt by others, [m] and the generality [n] of the Books ſeem to favour the contrary Opinion, as being more agreeable to the Reaſon of the Caſe above-mentioned, and the general Tenor of the Law in relation to Appeals, which in no Caſe, that I know of, will ſuffer the Right of bringing one to be transferred from one to another; and therefore, as in Caſe [o] where the deceaſed hath a Wife at the time of his Death, who dies within the Year and Day, the Heir hath no Right to an Appeal; ſo if he have an Heir at his Death, in whom the Right of the Appeal is veſted, and ſuch Heir die within the Year

[a] Cro. Car. 531, 532. 1 Jon. 425.
[b] 18 Ed. 4. 1. pl. 3. Fitz. Coro. 459. H. P. C. 181, 182. S. P. C. 59. D.
[c] Dy. 50. pl. 4. 1 Leon. 326.
[d] 27 Ed. 3. 83. pl. 2. Fitz. Coron. 322. H. P. C. 182. S. P. C 59. F. 27 Aſſ. pl. 25.
[e] H. P. C. 182. Fitz. Coro. 459. S. P. C. 60. Letter B.
[f] Fitz. Coro. 41. Bro. Appeal, 116, 131. 2 Aſſ. pl. 3.
[g] S. P. C. 59 F. H. P. C. 182.
[h] S. P. C. 60. Letter A. 1 Inſt. 8. a. 13. a. 20 H. 6. 43. b. Fitz. Coro. 235. But Fitz. Coron. 322, *ſeems contrary.*
[i] 7 Ed. 4. 15. pl. 3. Fitz. Coro. 28 Bro. Appeal, 94.
[k] S. P. C. 60. E. 11 H. 4. 11. b. 12. a. 9 H. 7. 5. b. 16 H. 7. 15. pl. 14.
[l] S. P. C. 59 G. H. P. C. 182. Bro. Appeal, 30, 88, 104, 141, 144.
[m] 16 H. 7. 15. pl. 14. Bro. Appeal, 156, 11 H. 4. 11. b.
[n] S. P. C. 59. G.
[o] Supra Sect. 39.

Dy. 69 pl. 31. [n] 20 H. 6. 43. b. 11 H. 4. 12. a. H. P. C. 182. Bro. Appeal, 30, 88, 104, 141, 144.

and Day, it ſeems, That no other Heir ſhall have an Appeal. Yet it is holden, [a] by Sir *Matthew Hale*, and ſome others, That if the firſt Heir get Judgment in an Appeal of Death, and die, his Heir may ſue Execution. But this is doubted of by Sir *William Staundford*, [b] and ſeems contrary to many [c] of the old Books, and not eaſily reconcileable with the Reaſon of the Caſes above-mentioned. But whether in this Caſe the Court may [d] not award Execution, either *ex officio*, or at the Demand of the King, may deſerve to be conſidered, for the Reaſons given *Section* 38. Alſo if a Perſon who is killed have no Wife at the time of his Death, and no iſſue but Daughters, and all thoſe Daughters die within the Year and Day, it may reaſonably be argued, That the Heir Male may have an Appeal, becauſe the Right of bringing one never veſted in any other before. But finding this Caſe in none of the Books, I ſhall leave it to be more fully conſidered by others.

[a] H. P. C. 182.
13 H. 4. 6 pl. 14.
11 H. 4. 11. b
[b] S. P. C. 59 I
[c] 38 H. 6. 13. pl. 26.
9 H. 7. 5. b. 6. a.
16 H. 7. 15. pl. 14.
11 H. 4. 11. b 12. a.
Bro. Appeal, 141, 144, 156.
[d] 2 Leon. 83 *ſeems contrary.*

Sect. 42. Fourthly, Every ſuch Appellant muſt not only be Heir general to the deceaſed, but alſo Heir male; and this depends upon *Magna Charta*, Ch. 35. by which it is enacted, *That no one ſhall be taken or impriſoned on the Appeal of a Woman for the Death of any one but her own Husband.* And the Judges are ſo far bound to take notice of this Statute, That if a Woman bring an Appeal of the Death of her Father, or any other but her Husband, they ought, [d] *ex officio*, to abate the Writ, though the Defendant take no Exception to it. But it is ſaid, [e] That by the Common Law an Heir female might have brought an Appeal of the Death of her Anceſtor, as well as an Heir male. And it ſeems [f] to be the better Opinion at this Day, That the Heir male of the deceaſed, who derives his Blood through a Female, may have an Appeal, as the Uncle being Heir on the part of the Mother, or the Grandſon by a Daughter, *&c.* and yet the Mother in the firſt Caſe, and the Daughter in the ſecond, could have had no Appeal; for inaſmuch as by the Common Law, ſuch Mother and Daughter had not only a Right to bring ſuch Appeal, but alſo to have ſuch Right derived through them to others, it ſeems hard to conſtrue the Statute by depriving them of the former to take from them the other alſo; eſpecially conſidering, That an Heir Male, who derives his Blood through Females, ſeems no way leſs worthy to bring an Appeal, than if he had derived it through Males; and all Statutes whatſoever, which are made in Abridgment of any Right of the Subject ought to be ſtrictly conſtrued.

[d] Fitz. Office de Court, 7. 10 Ed. 4. 7. pl. 18.
[e] 2 Inſt. 68. 1 Inſt. 25.
[f] H. P. C. 182, 183. 2 Inſt. 68. Fitz. Coro. 385. *the contrary adjudged by all the Judges, in the Exchequer Chamber, but one.* 20 H. 6. 43. Queræ 17 Ed. 4. 1. pl. 1. 1 Inſt. 25. S. P. C. 58. B. C. Bro. Appeal, 104.

Sect. 43. Fifthly, In every ſuch Appeal, by one, as Heir to the deceaſed, it muſt ſpecially [g] appear by the Writ, or at leaſt by the Count, in what manner he is ſo.

[g] 21 Ed. 3. 23 pl. 16. 45 Ed. 3. 25. pl. 36. 27 Aſſ. pl. 25. S. P. C. 81. Letter A. 1 Bulſt. 71, 75. H. P. C. 187.

And now I am come to an Appeal of Larceny, for the better underſtanding whereof, I ſhall conſider,

1. By whom it may be brought.
2. Againſt whom.
3. In what County.
4. Within what time.
5. Where there ſhall be a Reſtitution of the Goods ſtoln.

As to the firſt Point, *viz.* By whom an Appeal of Larceny may be brought, the following Particulars ſeem moſt remarkable.

Sect.

Sect. 44. First, There is no neceſſity that the Appellant have the abſolute Property of the Goods ſtoln; for it ſeems agreed that a Carrier, or even a Servant, [a] to whom Goods are delivered to be carried to a certain Place, or Churchwardens [b] having Poſſeſſion of the Goods of a Church, or in general, any Perſon whatſoever, [c] who is ſo far intruſted with the Goods of another as in Judgment of Law to have the Poſſeſſion, and not the bare Charge of them, may have an Appeal of Larceny againſt any one who ſhall ſteal them, for that they have a ſpecial kind of Property in them againſt all Strangers: And it ſeems that they may either bring a general [d] Appeal as for their own Goods, or a Special [e] one for the Goods of *J. S.* in their Cuſtody. Alſo it is ſaid, That a Perſon who hath been robbed of his Goods, ſtill continues to have ſo far the Poſſeſſion as well as the Property of them, that he may bring an Appeal of Larceny againſt any one who ſhall ſteal them from the Robber, as ſhall be more fully ſhewn in the next Section. But it ſeems [f] clear, That no one can maintain ſuch an Appeal who has the bare Charge of Goods without a Poſſeſſion, as a Butler or Cook, who in my own Houſe have the Charge of my Goods, for that in ſuch a Caſe the whole Poſſeſſion, as well as the abſolute Property, in the Judgment of Law always continues in me. Alſo it is certain, That a Villain cannot [g] have an Appeal of Larceny againſt his Lord, for any of his Goods taken by the Lord, becauſe [h] the Lord by ſeizing them makes them his own. But it is agreed, [i] That a Villain may have an Appeal of Death or of Rape againſt his Lord. Alſo it ſeems clear at this [k] Day, That any Tenant, who is not a Villain, may have an Appeal of Larceny againſt his Lord.

Sect. 45. Secondly, There is no neceſſity that the Wrong for which ſuch an Appeal is brought, were immediately done to the Perſon of the Appellant; for if a Servant be robbed of the Maſter's Goods in his Cuſtody, the Maſter [l] may bring the Appeal as well as the Servant, and in ſuch Caſe he who firſt commences it ſhall prevent [m] the other. Alſo if one be robbed of Goods wherein another is jointly intereſted with him, and die, the Survivor [n] may bring an Appeal. Alſo if I be robbed by *A.* who afterwards is robbed of the ſame Goods by *B.* it is ſaid, [o] That I may have an Appeal of Larceny againſt *B.* becauſe *A.* claiming no Property, but taking the Goods meerly as a Felon, had, in Judgment of Law, neither any Property nor Poſſeſſion in them, but the ſame wholly continued in me. But if the Goods had been taken from me by a Treſpaſſer, under the pretence of ſome Title, and ſuch Treſpaſſer had been robbed of them, it ſeems that I could have had no Appeal for them. Neither can an Executor [p] bring an Appeal for a Larceny from the Teſtator, becauſe ſuch Larceny, at the time when it was committed, was no injury to the Executor, but to the Teſtator only; and therefore the Appeal for it being a meer perſonal Action, and wholly veſted in the Teſtator, there is no doubt but that it dies with him, as all other Actions for mere Torts do.

[a] Fitz Coro. 100. Latch 127. S P. C. 60. F.
[b] 11 H. 4. 12. pl. 25. 12 H. 7. 27. b. 28, 29. 37 H. 6. 30, 31.
[c] 2 Ed. 4. 15. b. 2 Ri. 3. 22. pl. 53. 3 H. 7. 12. pl. 9. 5 H. 7. 18. pl 11. 21 H. 7. 14. pl. 23. Bract. Lib. 3. cap. 26. See B. 1. Ch. 33. S. 3. S. P. C. 60. F.
[d] Keilw. 70. pl. 7.
[e] Bract. lib. 3. cap. 26. Fitz. Coron. 100. 11 H. 4. 12. Bro. gard d'Egliſe, 6. Bro Coron. 142. Bro. Appeal, 91.
[f] 3 Inſt. 108. See B. 1. Ch. 33. S. 6.
[g] H. P. C. 184. S. P. C. 60. F. Fitz. Coron. 17. Bro. Coron. 216. Bro. Appeal, 34.
[h] Lit. Sect. 177.
[i] Lit. Sect. 189, 190. H. P. C. 184.
[k] S. P. C. 62. Letter A.
[l] H P.C. 184
[m] Latch 127. [n] H. P. C. 184. S. P. C. 61. Fitz. Coron. 392. [o] H. P. C. 184. S. P. C. 61. Fitz. Coro. 39, 79. 13 Ed. 4. 3. pl. 7. Keilw. 160. b. Bro. Appeal, 100. 4 H. 7. 5. b. See B. 1. Ch. 33. S. 9. [p] H. P. C. 184. S. P. C. 60. F.

Sect.

Sect. 46. As to the ſecond Point, *viz.* Againſt whom an Appeal of Larceny may be brought; having incidentally ſhewn what is moſt conſiderable relating to this Point under the former, I ſhall only take notice in this place, That this, or any other Appeal lies againſt an Infant, [a] as well as againſt a Perſon of full Age, and againſt a Feme covert, [b] in the ſame manner as if ſhe were ſole, without taking notice of the Husband.

Sect. 47. As to the third Point, *viz.* In what County ſuch Appeal is to be brought: There is no doubt, but that, like all other [c] Appeals, it is a Local Action, and muſt be brought in the County where the Felony complained of was done. Yet if one rob me in the County of *A.* and afterwards carry my Goods into the County of *B.* I have my Election [d] either to bring an Appeal of Robbery in the County of *A.* or an Appeal of Larceny in the County of *B.* becauſe the Poſſeſſion as well as the Property of the Goods continued in me, in Judgment of Law, after the Robbery; and therefore, in what Place ſoever the Robber keeps them from me, he feloniouſly injures me in the Poſſeſſion as well as Property of them, and conſequently may properly enough be ſaid to ſteal them from me: Yet he ſhall be appealed for the Robbery in the firſt County only, [e] for there only he was guilty of a taking from the Perſon, without which there can be no Robbery. Alſo [f] if one take me from the County of *A.* into the County of *B.* and there rob me, he ſhall be appealed for the Robbery in the County of *B.* only, for he was guilty only of a Treſpaſs in the County of *A.* But [g] if one bring my Goods into the County of *B.* by reaſon of a Menace in the County of *A.* it may be queſtioned which is the proper County for the bringing of the Appeal.

Sect. 48. As to the fourth Point, *viz.* Within what time an Appeal of Larceny is to be brought; It ſeems to be agreed [h] at this Day, that it may be ſued at any time, as well after as within the Year and Day, if the Plaintiff have made freſh Suit; for that the Statute of *Gloceſter*, Chap. 9. which requires, That an Appeal be brought within the Year and Day, hath been conſtrued [i] to intend no other Appeal but that of Death; and the Common Law ſeems to have limited no certain time for the bringing of an Appeal, but to have ſuffered it to be brought at any time by one who had made freſh Suit; the Nature whereof ſhall be more fully conſidered in the Fiftieth Section. But it ſeems, That one who has been guilty of a groſs neglect in purſuing the Offender, may be barred of ſuch an Appeal as well within the Year and Day as after; for that the Common Law ſeems [k] in all Appeals to have required, that the Appellant ſhould have made freſh Suit; and the ſaid Statute of *Gloceſter*, which takes away the neceſſity of it in Appeals of Death brought within the Year and Day, extends not to other Appeals.

Sect. 49. As to the fifth Point, *viz.* In what Caſes there ſhall be a Reſtitution of the Goods ſtoln, I ſhall premiſe, That until [l] ſuch Goods are ſeiz'd to the uſe of the King, or of ſome other Perſon claiming them under the Crown, as being Waifs, or the Goods of a Felon, *&c.* the rightful Owner, without any freſh Suit or Appeal, may ſeize them where-ever he finds them; but they ſhall not be reſtored to them after ſuch Seizure by others, without bringing his Appeal, *&c.* And for the better underſtanding in what Caſes a Reſtitution of the Goods ſo ſeiz'd ſhall be awarded on ſuch an Appeal, I ſhall examine the following Particulars.

1. Whether

[a] S. P. C. 62. a. H. P. C. 185.
[b] Bro. Coro. 50. 15 Ed. 4. 1. pl. 2. S. P. C. 62. A. H. P. C. 185. Vide Fitz. Coron. 17.
[c] Supra Sect. 35. 11 H. 4. 93. pl. 53. Fitz. Coro. 437. Bro. Appeal, 35. Dyer, 38, 39, 40.
[d] 7 H. 4. 43. pl. 9. Dy. 39, pl. 56. 40. pl. 66. 4 H. 7. 5. b. 6. a. S. P. C. 63. G. 26 Aſſ. pl. 32. 7 Co. 2. a. Fitz. Coro. 62, 79. Fitz. Aſſiſe, 446. Bro. Aqpeal, 35. B. 1. Ch. 33. S. 9.
[e] H. P. C. 184. 7 Co. 2. a. Contra Keilw. 160. b.
[f] S. P. C. 63. Letter F. Infra. Sect. 71.
[g] S. P. C. 63. letter F.
[h] H. P. C. 185. S. P. C. 62. Letter B. 165. D. Bro. Appeal, 37, 62, 7 H. 4. 44. pl. 9. Contra 22 Aſſ. pl. 97.
[i] Supra Sect. 33.
[k] 2 Inſt. 319.
[l] 21 Ed. 4. 16, pl. 7. Fitz. Eſtray, 2. Avowry, 151. S. P. C. 186.
[c] Co. 109.

1. Whether it neceſſarily require a freſh Suit.
2. What ſhall be eſteemed a freſh Suit.
3. By whom, and in what manner, ſuch freſh Suit ſhall be inquired and adjudged.
4. How far the Appeal muſt be proſecuted.
5. Whether the Appellant's Title to ſuch Reſtitution ſhall be preferred to any ſubſequent Title claimed in the Goods.
6. Whether there ſhall be ſuch a Reſtitution on any other Proſecution beſides that of Appeal.
7. Whether there ſhall be a Reſtitution to any Goods not mentioned in the Appeal.

Sect. 50. As to the firſt Particular, *viz.* Whether ſuch Reſtitution neceſſarily require a freſh Suit; It ſo fully appears to do ſo by almoſt all the Books [a] relating to this Matter, that it ſeems needleſs to cite Authorities to prove it.

Sect. 51. As to the ſecond Particular, *viz.* What ſhall be eſteemed a freſh Suit; It ſeems to have been anciently holden, [b] That to make a freſh Suit, the Party ought to have raiſed a Hue and Cry with all convenient Speed, and alſo to have taken the Offender: But at this Day it ſeems to be ſettled, [c] That if the Party have been guilty of no groſs Neglect, but have uſed all reaſonable Care, and Diligence in inquiring after, purſuing, and apprehending the Felon, he ought to be allowed to have made ſufficient freſh Suit, whether any Hue and Cry were levied or not, and whether ſuch Offender were taken by means of ſuch Purſuit, or without any Aſſiſtance from it.

Sect. 52. As to the third Particular, *viz.* By whom, and in what manner, ſuch freſh Suit ſhall be inquired and adjudged; It ſeems, [d] That it is uſual and proper to make ſuch Inquiry by the ſame Jury that tries the principal Matter; and it is certain, That upon the finding of the freſh Suit by ſuch Jury, the Court may award a Reſtitution: And in ſuch Caſes wherein the Appellee is condemned without any Trial, as where he is convicted by his own Confeſſion, or outlawed, or ſtands mute, *&c.* it ſeems, That the Court may make ſuch Inquiry by any [e] Inqueſt of Office, returned for ſuch Purpoſe, and on their finding the freſh Suit award a Reſtitution: But in either Caſe ſuch Inqueſt is but an Inqueſt [f] of Office, and perhaps is not abſolutely neceſſary, but required chiefly for the Satisfaction of the Conſcience of the Judges, in a matter which, if they think fit, they may, by the Purport of ſome Authorities, [g] examine themſelves, as they generally may (according to ſome [h] Opinions) any matters whatſoever inquirable by an Inqueſt of Office, eſpecially [i] if the Parties intereſted in the thing in queſtion be willing that they ſhould do ſo: And agreeably hereto it is holden, in the beſt Authors, [k] That the judging of freſh Suit lies in the Diſcretion of the Court; and there is a Caſe [l] wherein a Writ of Reſtitution of the Goods ſtoln was actually awarded, without making any Inquiry of the freſh Suit; but in the Book wherein this Caſe is reported, it is made a Query, whether ſuch Inquiry ought not to be made at the Return of ſuch Writ.

Sect. 53. As to the fourth Particular, *viz.* How far the Appeal muſt be proſecuted in order to intitle the Appellant to a Reſtitution,

[a] See the Authorities cited to the three next Sections.
[b] Fitz. Coro. 379, 319, 392. S. P. C. 62. 165. 2 Rich. 3. 13. a.
[c] Bro. Freſh Suit, 1, 6. 7 H. 4. 44. pl. 9. S. P. C. 62. letter B. 165. D. Query Hetley, 64, 65.
[d] 4 Ed. 4. 11. b. S. P. C. 166. Letter B.
[e] 8 H. 4. 1. pl. 2. 7 H. 4. 31. pl. 16. 2 Rich. 3. 13 pl. 31. 19 H. 4. 5. pl. 18. Contra S. P C. 166. Letter B.
[f] S. P. C. 166 Letter B. *and ſee the Books cited to the other points of this Section.* and Raſtal's Entries, 52, 53.
[g] Vide Fitz. Coro. 379, 392.
[h] 14 H. 4. 9. b. 3 H. 6. 29. b

8 H. 6. 5. a Yel 152. 1 Brownl. 214. 1 Sid. 442. pl. 15. Contra Latch 213. 3 Leon. 150, 213.
[i] Cro. Jac. 415. pl. 3. 2 Saund. 106, 107. [k] H. P. C. 185. S. P. C. 62. Letter B. [l] 21 Ed. 4. 16. pl. 7. Fitz. Coron. 42. Bro. Freſh Suit, 4. Vide S. P. C. 166. Letter A. 2 Leon. 108.

it ſeems, That anciently the Appellant could in no Caſe be intitled to a Reſtitution, unleſs [a] the Appellee were attainted at his Suit; and therefore, if ſeveral Appeals were commenced againſt the ſame Perſon, by ſeveral Plaintiffs, and the Appellee were attainted at the Suit of one of them, no [b] other could have a Reſtitution, becauſe the Appellee [c] being once attainted, could not be afterwards attainted again: But [d] it ſeems to be ſettled at this Day, That there is no ſuch neceſſity that the Appellee be attainted at the Suit of the Appellant; and therefore in the Caſe above mentioned, after ſuch Attainder at the Suit of one Appellant, it ſhall be inquired by an Inqueſt of Office, Whether the Appellee were guilty of the Facts complained of in the other Appeals, and made freſh Suit, *&c.* and upon ſuch matter found by ſuch Inqueſt, a Reſtitut ion ſhall be awarded, *&c.* Alſo [e] if an Appellee die in Priſon, it ſeems, That the like Inquiry ſhall be made by Inqueſt of Office, and thereupon a Reſtitution awarded, *&c.* And [f] if an Appellee be outlawed, or have the Benefit of his Clergy before Conviction, or ſtand mute, or challenge peremptorily above twenty Jurors, or break from Priſon, perhaps a Reſtitution ſhall be awarded upon ſuch an Inqueſt's finding the freſh Suit, without any farther Inquiry whether the Appellee were guilty or not; becauſe, by refuſing to take his Trial, he tacitly ſeems to admit himſelf Guilty. Alſo if one bring an Appeal againſt two, whereof one is attainted, and the other acquitted; yet [g] it ſeems, he ſhall have a Reſtitution. But [h] if both the Appellees had been acquitted, it ſeems, That the Appellant ſhould never have his Goods again, though it were expreſsly found that they were his Goods, but he ſhall forfeit them to the King for his falſe Appeal. But *Quære* if this ought not to be underſtood of ſuch Goods only [i] as were before ſeiſed to the King's Uſe, as having been waived, *&c.*

[a] 44 Ed. 3. 44. pl. 57. Fitz. Coron. 95, 162, 318, 319. Avowry, 151. S. P. C. 165, Letter D. 166

[b] Fitz. Coro. 95.

[c] Vide infra, in the Chapter concerning Judgment. Contra 4 Ed. 4. 11. b

[d] S. P. C. 166 7 H. 4. 31. pl. 16. Fitz. Coron. 81, 194, 379, 380.

[e] Fitz. Coro. 379. Forfeiture, 15. S. P. C. 166

[f] 21 Ed. 4. 16. pl. 7. 10 H. 4. 5. pl. 18. 40 Aſſ. 39. 2 R. 3. 13. pl. 31. 8 H. 4. 1. pl. 2. 26 Aſſ. 32. Fitz. Coron. 42, 71, 194, 217, 379, 466 S P. C. 166 2 Leon. 108

[g] S. P. C. 166

[h] Fitz. Coron. 367 368 5 Co. 110. a

[i] Vide Supra Sect. 48. 5 Co. 110. a S. P. C. 186. Contra 3 Inſt. 227.

Sect. 54. As to the fifth Particular, *viz.* Whether the Appellant's Title to ſuch Reſtitution, ſhall be preferred to any ſubſequent Title gained in the Goods; It ſeems clear, That the Appellant's Title to ſuch Reſtitution ſhall not [k] be barred by any Seiſure of ſuch Goods, as being Waiſs, or Eſtrays, or the Goods of Felons, *&c.* nor [l] even by a Sale of them, *bonâ fide*, made in Market overt, *&c.* And by the like reaſon it is certain, That the Proſecutor of an Indictment, ſince 21 *H.* 8. 11. ſet forth more at large in the next Section, ſhall not be barred of his Reſtitution by any ſuch Seiſure, or Sale, *&c.*

[k] S. P. C. 186 5 Co. 109. 21 Ed. 4. 16. pl. 7. Keling, 35, 47. See the Books cited Sect. 49 Query Hetley, 64, 65. Fitz. Avowry, 151. Coron. 71, 318, 319. Bro. Appeal, 24.

Sect. 55. As to the ſixth Particular, *viz.* Whether there ſhall be a Reſtitution of the Goods ſtoln, upon any other Proſecution beſides that of Appeal; It ſeems to be clearly agreed, [m] That by the Common Law it could not be had upon any other Proſecution whatſoever: But to remedy this Inconvenience, it is enacted by 21 *H.* 8. 11. *That if any Felon or Felons, do rob, or take away any Money, Goods or Cattels, from any of the King's Subjects, from their Perſons or otherwiſe, within this Realm, and thereof the ſaid Felon or Felons be indicted, and after arraigned of the ſaid Felony, and found guilty thereof, or otherwiſe attainted by reaſon of Evidence given by the Party ſo robbed, or Owner of the ſaid Money, Goods or Cattels, or by any other by their Procurement; that then the Party ſo robbed, or Owner, ſhall be reſtored to his ſaid Money, Goods and Cattels; and that as well the Juſtices of Gaol-delivery, as other Juſtices, afore whom any ſuch Felon or Fe-*

[l] Keling, 34, 47. Query Moor, 360. Popham, 84. 1 And 344. [m] 4 H. 7. 5. pl. 1. 62, 460. S. P. C. 66. Letter E. 165, 167, Letter A. H. P. C. 212. Latch. 144.

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lons shall be found Guilty, or otherwise attainted, by reason of Evidence given by the Party so robbed, or Owner, or by any other by their Procurement, have Power by the said Act to award from time to time, Writs of Restitution for the said Money, Goods and Chattels, in like manner as though any such Felon or Felons were attainted at the Suit of the Party in Appeal.

Sect. 56. Sir *William Staundford*, [a] in his Construction of this Statute, seems to incline to an Opinion, That the Party may have a Restitution by vertue of it without making any fresh Suit; and this seems to be agreeable to Practice, and the Purport of the first part of the Statute, which seems to require no more in order to intitle the Party to a Restitution, than that the Indicter be found Guilty, or otherwise attainted by his Evidence, *&c.* Yet if it shall plainly appear to the Court, That the Party hath been guilty of a gross Neglect in prosecuting the Offender, it may reasonably be argued, That he is not intitled to a Restitution; for the latter part of the Statute, by ordaining, That Writs of Restitution shall be awarded as though the Felon had been attainted in an Appeal, seems to imply, That it is a sufficient Favour, within the Intention of the Makers of the Statute, to the Prosecutor of an Indictment, to give him a like Remedy for a Restitution of his Goods as the Common Law gave to the Plaintiff in an Appeal; but it is certain, [b] That the Plaintiff in an Appeal, who appears to have been guilty of such a Neglect, cannot demand a Restitution by the Common Law. And the Construction I would contend for will appear the more reasonable, if it be considered, that it hardly can be imagined to be the Intention of the Makers of the Statute, to give the Party a greater Benefit from a Conviction grounded on his own Evidence, as a Conviction on an Indictment may be, than from a Conviction on the Evidence of others, as a Conviction in Appeal must be. However if it shall appear to the Court, upon the Evidence at the Trial, or otherwise, That the Party has been reasonably diligent in prosecuting the Offence, I readily grant, That the Justices may, if they think fit, in their Discretion award a Restitution, without making any Inquiry concerning the fresh Suit; but this seems to be no more than they may also do in Appeal, if they think fit, as I have already more fully endeavoured to shew in Section 52.

[a] S. P. C. 167

[b] Supra Sect. 50, 51, and 52.

Sect. 57. As to the seventh Particular, *viz*, Whether there shall be a Restitution to any Goods not mentioned in the Appeal; There is no doubt, but that if a Man be robbed of several Goods by the same Person, either at the same or different times, and such Goods be seised as Waifs, *&c.* and afterwards the Party, in his Appeal for the Robbery, mention some of those Goods only, and omit the rest, and the Appellee be convicted, *&c.* the Appellant shall be restored to such of the Goods only as were mentioned in the Appeal, and the rest shall be confiscated, not only in respect of that Favour which the Law presumes that the Appellant beareth to the Felon, in making the Charge against him easier than it ought to have been, which might possibly have given him an Opportunity to have escaped, but also because, as it seemeth, the Restitution ought regularly to be grounded on the Record of the Appeal, and by that no other Goods can appear to have been stoln than what are mentioned in it: But whether an Appellant, who had, before his Appeal brought, lawfully regained the Possession of his Goods stoln, shall forfeit to the King such of them as he leaves out of his Appeal, doth neither clearly appear from the principal [d] Case concern-

[c] Fitz. Coro. 100. H. P. C. 184. 3 Inst. 227. 5 Co. 110. a. S. P. C. 186.

Vide Supra Sect. 49, & 54.

[d] Fitz. Coo. 100.

concerning this matter, nor from any of the Books above-cited, which ſeem chiefly to rely on the Authority of it. But there is a ſpecial [a] Caſe wherein the Appellant ſhall recover things which were neither ſtoln from him, nor mentioned in his Appeal; as where the Appellee ſells [b] the things ſtoln, or exchanges [c] them for ſome other thing, before the Appeal brought, and the Money taken on the Sale, or thing given in Exchange, are ſeiſed to the King's Uſe, *&c.* in which Caſe they ſhall be delivered to the Appellant, on the Conviction of the Appellee, though they were never in his Poſſeſſion before; for he appears to be in no manner of fault, and there is no reaſon that he ſhould be prejudiced by the Act of the Felon. And I take it for granted, That in all theſe Caſes the Law is the ſame at this Day in relation to a Reſtitution, by force of the above-cited Statute of 21 *H.* 8. to the Proſecutor of an Indictment.

[a] Vide Fitz. Coron. 323. Bro. Reſtitution, 22. Property, 34. 2 Bulſt. 310.
[b] Noy. 128.
[c] Cro. El. 661.

And now I am come to an Appeal of Rape, for the better underſtanding of the Nature whereof, I ſhall conſider,

1. By whom, and in what manner it may be brought.
2. In what County.
3. Within what time.

Sect. 58. As to the firſt Point, *viz*, By whom, and in what manner an Appeal of Rape may be brought; It ſeems, [d] That by the Common Law, it might be brought by any Woman who had been raviſhed, againſt the Raviſher, whether ſuch Perſon raviſhed were the Nief [e] of the Raviſher, or a Free Woman, and whether ſhe were a Virgin, Wife, or Widow; neither [f] do I find that ſhe could be barred of her Appeal at the Common Law, for conſenting after the Rape, to the Raviſher, as ſhe may [g] be at this Day, by force of the Statutes of *Weſtminſter* 2. 34. & 6 *Ric.* 2. 6. But it ſeems, That a Woman lawfully married, can neither [h] by the Common Law, nor by force of any Statute, bring ſuch an Appeal without her Husband, as one married *de facto* only, and not *de jure*, perhaps may.

[d] Bracton, 147, 148. Fleta Lib. 1. cap. 25. Sect. 14. 2 Inſt. 180. See Book 1. Ch. 41. Sect. 7.
Contra 2 Inſt. 433. 1 Inſt. 123. b
[e] Littleton, Sect. 190.
Contra Fitz. Coron. 17. S. P. C. 98. b
[f] Vide Bract. 147. S. P. C. 61, 148. Lerter A.
[g] Vide 2 Inſt. 433, 434. Infra Sect. 59 60, 61.
[h] 8 H. 4. 21. pl. 2. 11 H. 4. 14. S. P. C. 98. b

Sect. 59. But howſoever the Common Law might ſtand in relation to Appeals of Rape, it ſeems, That they were wholly taken away by the Statute of *Weſtminſter* 1. 13. by which the Offence of Rape was reduced to a Treſpaſs only, and conſequently puniſhable only by an Action, or Indictment of Treſpaſs: But afterwards, Appeals of Rape were given again by the Statute of *Weſtminſter* 2. 34. by which it is enacted, *That if a Man from thenceforth do raviſh a Woman married, Maid, or other, where ſhe did not conſent, neither before nor after, he ſhall have Judgment of Life and Member. And likewiſe where a Man raviſheth a Woman married, Lady, Damoſel, or other, with Force, although ſhe conſent after, he ſhall have ſuch Judgment as before is ſaid, if he be attainted at the King's Suit, and there the King ſhall have the Suit.*

[i] 47 Aſſ. 6. Littleton, Sect. 190. 2 Inſt. 433. S. P. C. 6, 81
Contra Fitz. Utlagary, 49. Bro. Coron. 169.
[k] Vide Supra Ch. 10. Sect. 32.

Sect. 60. It ſeems to be ſo clear, [i] That this Statute impliedly gives an Appeal to the Woman who does not conſent to the Raviſher, that it ſeems needleſs to endeavour to prove it; but it is obſervable, [k] That the Statute does not reſtore the old Common Law in relation to ſuch Appeals, as it would have done if it had only repealed the above-mentioned of *Weſtminſter* 1. 13. but makes a new Law in relation to them; from

from whence it follows, That all Appeals of Rape at this Day, muſt [a] conclude *contra formam Statuti.*

[a] 9 Ed. 4. 26. a Fitz. Enditement, 18. Dyer, 202. pl. 68. Vide infra, Sect. 70.

Sect. 61. It is farther enacted, by 6 *Rich.* 2. 6. in the following Words, *Againſt the Offenders and Raviſhers of Ladies, and the Daughters of Noblemen, and other Women in every part of the Realm, in theſe Days offending more violently, and much more than they were wont: It is ordained and ſtabliſhed, That whereſoever, and whenſoever ſuch Ladies, Daughters, and other Women aforeſaid be raviſhed, and after ſuch Rape do conſent to ſuch Raviſhers, That as well the Raviſhers as they that be raviſhed, and every of them, be from thenceforth diſabled, and by the ſame Deed be unable to have or challenge all Inheritance, Dower, or joint Feoffment after the Death of their Husbands and Anceſtors. And that incontinently in this Caſe, the next of the Blood of thoſe Raviſhers, or of them that be raviſhed, to whom ſuch Inheritance, Dower, or joint Feoffment ought to revert, remain, or fall after the Death of the Raviſher, or of her that is ſo raviſhed, ſhall have Title; that is to ſay, after the Rape to enter upon the Raviſher, or her that is raviſhed, and their Aſſigns, and Land-Tenants, in the ſame Inheritance, Dower, or joint Feoffment, and the ſame to hold in State of Inheritance: And that the Husbands of ſuch Women, if they have Husbands, or if they have no Husbands in Life, that then the Fathers, or other next of their Blood, have from thenceforth the Suit to purſue, and may ſue againſt the ſame Offenders and Raviſhers in this Behalf, and to have them thereof convict of Life, and of Member, although the ſame Women after ſuch Rape, do conſent to the ſaid Raviſhers. And the Defendant in this Caſe ſhall not be received to wage Battel, but the Truth of the Matter ſhall be tried by Inquiſition of the Countrey. Saving always to our Lord the King, and to other Lords of the Realm, all their Eſcheats of the ſaid Raviſhers, if peradventure they be thereof convict.*

In the Conſtruction of this Statute the following Points have been holden.

Sect. 62. Firſt, That [b] in an Appeal brought upon it by a Husband for the Rape of his Wife, it is a good Plea, That the Appellant and Woman raviſhed were never lawfully married, which ſhall be tried by the Biſhop's Certificate, who, if the Marriage were unlawful by reaſon of a Precontract, *&c.* ought to certifie againſt the Appellant.

[b] 11 H. 4. 13, 14. Fitz. Coron. 86, 228. Bro. Parliament, 89.

Sect. 63. Secondly, That there is no [c] neceſſity to alledge, That the Woman did conſent to the Raviſher, in a Count which rehearſes the Statute, and concludes that the Rape was againſt the Form of it; which implies, that the Woman conſented, *&c.*

[c] 11 H. 4. 14. Fitz. Coron. 86, 228. S. P. C. 81. Letter C. Dy. 312. pl. 86, 202. pl. 68.

Sect. 64. Thirdly, That [d] if a Woman who hath neither Husband nor Father, be raviſhed by her next of Kin, and conſent to him, the next of Kin to the Raviſher ſhall have the Appeal.

[d] 2 Inſt. 434 Vide Supra. Sect. 39, 40,

Sect. 65. Fourthly, That [e] whoſoever happens at the time to be next Heir to the Perſon ſo raviſhed, and conſenting, *&c.* ſhall have the Appeal, and alſo enter [f] into the Lands of the Perſon raviſhed, and retain them againſt any other who ſhall afterwards happen by matter *ex poſt facto* to become Heir; and therefore where a Woman having Iſſue only a Daughter, conſents to a Raviſher, and the Daughter enters, and then a Son is born to ſuch Woman, the Daughter ſhall retain the Lands, becauſe ſhe took them by Vertue of a Title given by the Statute which firſt veſted in her as a Purchaſer, and never was in any Anceſtor.

[e] S. P. C. 61. b.

[f] Fitz. Aſſize 27. 5 Ed. 4 6. a 9 H. 7. 25. a Long quinto 5 Ed. 4. 60, 61. 1 Co. 95. a 98, 137, b. 3 Co. 61. a. 62. a. Pl. Com. 56. b

Sect. 66. Fifthly, That [a] the next in Remainder or Reverſion, to whom the Lands of the Woman who conſents to a Raviſher would come if ſhe were dead, ſhall enter and retain her Lands by Vertue of the Statute, provided he be of Kin to her, albeit another Perſon be nearer; yet it ſeems, That the Perſon ſo intitled to the Lands cannot have an Appeal of Rape where there is another nearer of Kin; for though the Clauſe relating to the Entry into the Lands ſeems to intitle ſuch of the next of Kin, to whom the Inheritance would fall after the Death of the Party, whether they be abſolutely neareſt or not; yet the Clauſe relating to the Appeal ſeems to extend to none but the Husband, or Father, or very next of Kin.

[a] Long quinto, Ed. 4. 58, 59, 60. Bro. Entry Congeable, 94 5 Ed. 4. 5. pl. 24 Fitz. Aſſize, 27.

Sect. 67. Sixthly, That it is not [b] ſufficient in ſetting forth the Title of the Perſon claiming the Lands by Vertue of the Statute, to ſay in general, That he is next of Blood to whom the Inheritance would fall, *&c.* without ſhewing ſpecially in what manner he is ſo, *&c.*

[b] Long quinto, Ed. 4. 58. Pl. Com. 42. 43.

Sect. 68. Seventhly, That it is not [c] concluſive Evidence to prove the Woman's Conſent to the Raviſher to ſhew, That ſhe lived with him ſome Years as his Wife, and had a Child by him, if all the time ſhe was under his Power, and never at her Liberty.

[c] Long quinto, Ed. 4. 59, 60, 61. Bro. Entry Congeable, 94 5 Ed. 4. 5. pl. 24.

Sect. 69. Eighthly, That [d] if the Party raviſhed and conſenting to the Raviſher, be under the Age of twelve Years, ſhe ſhall not loſe her Lands by the Intent of the Statute, for that the Conſent of a Woman under that Age is looked upon as given by one uncapable of Diſcretion, and therefore is not regarded by the Law.

[d] Pl. Com. 364. See 1 Danv. Abr. 698. pl. 12. 699. 700. Letter B. 1 Inſt. 79.

Sect. 70. Ninthly, That [e] in Appeals brought on this Statute, the Count ought to rehearſe it: But I do not find any Reſolution cited to maintain this Opinion. It is true indeed, That in the Year Book of 11 *H.* 4. 13. 14. the Statute is recited in an Appeal grounded on it: But it is not there ſaid to be neceſſary to be ſo recited; neither do I find any Reaſon given why an Appeal may not as well be grounded on this Statute without reciting it, as on the Statute of *Weſtminſter* 2, 34. as [f] it is agreed that it may be: If it be ſaid, [g] That the Common Law gave the ſame Appeal as is given by the Statute of *Weſtminſter* 2. and therefore there is no need to recite it; but that there never was ſuch an Appeal at the Common Law as is given by the Statute of *Rich.* 2. and therefore the Appeal grounded on it ought to recite it; it may be anſwered, That the ſaid Statute of *Weſtminſter* [h] does not revive the old Common Law in relation to ſuch Appeals, but makes a new Law in relation to them; ſo that Appeals brought upon it, do altogether as much depend upon it, as thoſe brought on the Statute of *Rich.* 2. do on that. Neither [i] does there appear to be any ſuch Rule, That in Indictments, or Actions grounded on Statutes which give a remedy in Caſes which were no way provided for by Law, there is a neceſſity to recite ſuch Statutes; and indeed at beſt it ſeems but Surplus to recite what the Court is bound *ex officio* to take Notice of.

[e] S. P. C. 61. Letter C See 1 H. 6. 1 pl. 1. Bro. Rape, 4

[f] S. P. C. 81. Letter C. See 1 H. 6. 1. pl. 1. Bro. Rape, 4

[g] Vide 5 H. 7. 17. pl. 10

[h] Supra Sect. 59, 60.

[i] 5 H. 7. 17. pl. 10. Cro. Car. 564. 6 Mod. 140.

Sect. 71. As to the ſecond Point, *viz.* In what County an Appeal of Rape may be brought; There is no doubt, but that this, like all other [k] Appeals, is a local Action, and conſequently ought to be brought in the County wherein the Felony was done. And therefore if a Man take a Woman by Force in one County, and carry her into another, and there raviſh her, the Appeal [l] ſhall be brought only in the County wherein the Rape was committed; for the Taking in the other was no more

[k] Supra Sect. 35, 47.

[l] 3 H. 7. 12. pl. 4. Fitz. Viſne, 28. Bro. Appeal, 83. S. P. C. 63. Letters E, F. H. P. C. 186.

more than a Treſpaſs, and needs not be taken Notice of at all in the Appeal of the Rape; and if it be, is only looked upon as Surplus.

Sect. 72. As to the third Point, *viz.* In what Time an Appeal of Rape may be brought; It ſeems, That at this Day it may be brought in any reaſonable [a] Time, the Judgment [b] whereof lies in the Diſcretion of the Court, for that at the Common Law there was no certain Time limited for the bringing of it; and the Statute of *Weſtminſter* 1. 13. by which the Offence of Rape was turned into a Treſpaſs, and forty Days limited for the Suit of the Perſon raviſhed, is repealed; and the Statute of *Glouceſter* 9. which requires that Appeals be brought within the Year and Day, extends only to Appeals of Death; and the Statute of *Weſtminſter* 2. 34. which makes Rape a Felony again, limits no Time for the bringing of it, but leaves it to the Conſtruction of Law, which ſhall be agreeable to the ancient Rules of Law in ſuch Points, wherein the Statute is ſilent.

[a] S. P. C. 63. Letter C. H. P. C. 186.
[b] Vide Supra Sect 51, 52 Littleton, 69 1 Inſt. 56. Supra Sect. 33, 48.

Sect. 73. And now I am come to an Appeal of Arſon; [c] but the Learning relating to it, ſeeming to be altogether obſolete at this Day, I ſhall refer the Reader to the Old [d] Books for it.

[c] 1 Inſt. 288. a
[d] Fleta. lib. 1. cap. 37. Bract. Lib. 3. cap. 27.

Having thus endeavoured to ſhew in what Courts Appeals may be brought, and the ſeveral Kinds of them, and examined the Particulars which ſeemed moſt properly to come under the Conſideration of each Kind, I ſhall now proceed to examine ſome other matters concerning them, wherein I ſhall conſider them all together. As

[e] 2 Inſt. 313. Salk. 59, 62, 64. Bro. Attorney, 64, 78. 2 Ri. 3. 13. pl. 38. Bro. Appeal, 112. Raſtal's Entries, 47.

1. In what Caſes the Appellant and Appellee are to appear in proper Perſon, and where by Attorney, or Guardian.
2. How the Appellant ought to declare.
3. How he may be nonſuited.
4. For what Faults the Writ may be abated.
5. What may be pleaded in Bar of an Appeal.
6. Where the Appellant and his Abettors ſhall render Damages to the Appellee for a falſe Appeal.
7. Where the Appellant is to be fined.

[f] 2 Inſt. 313. F. N. B. 27. f Contra Fitz. Attorney, 104. 21 H. 7. 39. pl. 54.

Sect. 74. As to the firſt Point, *viz.* In what Caſes the Appellant and Appellee are to appear in proper Perſon, and where by Attorney, or Guardian: It ſeems, That by the Common Law neither [e] Plaintiff nor Defendant in any Appeal whatſoever, whether of Felony, or Mayhem, [f] could make an Attorney, but muſt appear either by Guardian, [g] or in proper Perſon, on every [h] Day of Continnance, except in ſome ſpecial Caſes; as where the Defendant being convicted in an Appeal of Felony pray'd the Benefit of his Clergy, and the Plaintiff reply'd, that he had been twice married, in which Caſe he might [i] be admitted to go on with the Suit by Attorney, becauſe he had nothing more to do but to get a Certificate of the Bigamy from the Biſhop, which, as it was [k] ſaid, any Stranger might procure as well as the Plaintiff. *Sed Quære*; for it is ſaid, [l] That none can demand Execution but the Plaintiff, and that the Plaintiff cannot do it but in proper Perſon; from whence it ſeems reaſonable to argue, That he ought, in all other Caſes, as well to carry on his Suit in proper Perſon. But it ſeems [m] clear, That after a Defendant is acquitted, he may appear by Attorney for the Recovery of his Damages againſt the Abettors, *&c.* And it is enacted [n] by 3 *H.* 7. 1.

[g] Supra Sect. 30.
[h] 1 H. 7. 27. pl. 3. Fitz Utlagary, 34.
[i] 40 Aſſ 17. Fitz. Attorney, 39, 90. 40 Ed. 3. 42. pl. 23. S. P. C. 135. Vide Fitz. Coron. 13.
[k] 11 H. 4. 11. b. S. P. C. 135. Fitz. Coron. 13.
[l] 21 Ed. 4. 72. 73.
[m] 8 Ed. 4. 3. pl. 5. Fitz. Attorney, 24.
[n] F. N. B. 26.

That

That the Appellant in any Appeals of Murder or Death of a Man, where Battel by the courſe of Common Law lies not, may make Attorney and appear in the ſame, in the ſaid Appeals after they be commenced, to the End of the Suit and Execution of the ſame. But [a] if a Defendant or Plaintiff appear and plead by Attorney where they ought not, and the Court receive the Plea and adjourn the Cauſe, it ſeems. That the Appeal is diſcontinued, becauſe ſuch Appearance was meerly void in Law.

[a] Salk. 59,62

As to the ſecond Point, *viz.* In what Manner the Appellant ought to declare; I ſhall refer the Reader for Precedents of Counts in Appeal, to *Staundford's* [b] *Pleas of the Crown*, and the Books [c] of *Entries*, and ſhall in this Place conſider only the following Particulars.

[b] S.P.C. 78, 79.
[c] Raſtal's & Coke's Entries, Titles Appeal & Mort.

1, In what Manner ſuch Count muſt purſue the Writ.
2. How it ought to ſet forth the Subſtance and Manner of Fact.
3. How the Circumſtances of Time and Place.
4. Whether one and the ſame Count ought to be againſt thoſe who do not appear as well as againſt thoſe who do appear, and againſt the Acceſſories as well as the Principals.

Sect. 75. As to the firſt Point, *viz.* In what manner the Count in Appeal muſt purſue the Writ; I ſhall take it for granted, That this, like all other Counts in other Actions, muſt in Subſtance [d] agree with the Writ, which ſhall be abated if the Count vary from it in any material Point. And therefore in a Common Appeal of Death, if the Appellant declare, That the Appellee traiterouſly killed the Perſon deceaſed, as he was going to ſuccour the King in his Wars, the Writ ſhall be abated [e] becauſe that contains no Charge of Treaſon. So alſo if the Plaintiff, in an Appeal of Mayhem, declares, That the Appellee beat as well as maimed him, the Writ ſhall be abated [f] becauſe that mentions not any Battery.

[d] Finch of Law, 357.
[e] Bro. Appeal, 12. 45 Ed. 3. 25 pl. 36. 21 Ed. 3. 23. pl. 16. S. P. C. 78. Letter C.
[f] Fitz. Coro. 110. Supra Sect. 20.

As to the ſecond Point, *viz.* In what manner the Count in Appeal ought to ſet forth the Subſtance and Manner of the Fact, I ſhall obſerve the following Particulars.

Sect. 76. 1. That where ſeveral are preſent at the Fact, and one only actually does it, and the others abet and encourage him, it is in the Election of the Plaintiff, either to ſuppoſe [g] in his Declaration, That every one of them did the Fact, becauſe in ſuch a Caſe the Act of one is, in the Judgment of the Law, the Act of all; or to ſhew the ſpecial [h] manner of the Caſe as in Truth it was, and ſet forth the Fact to have been done only by the Perſon who did it, and the others to have been his Abettors, *&c.*

[g] 11 H. 4. 13. b. 4 H. 7. 18. pl. 10. S P. C. 44. Letter B. 80. Letters C.D. Supra Sect. 19.
[h] H. P. C. 187. Bro Rape, 2, 3 See the Chapter of the Arraignment of Principal & Acceſſory.

Sect. 77. II. That no *Periphraſis*, [i] or Circumlocution whatſoever, will ſupply the want of thoſe Words of Art, which the Law hath appropriated for the Deſcription of the Offence; from whence it follows, That an Appeal of Death cannot [k] amount to a Charge of Murder without the Word *Murdravit*, let it be never ſo exact and particular in ſetting forth the Malice and all other Circumſtances of the killing; neither

[i] 4 Co. 41. Fitz. Coro. 97, 216, 40 Aſſ. 25. 57, *&c.*
[k] Dy. 261. pl. 26. Cro. Jac. 20. Salk. 377. 9 Ed. 4. 26. b.

44 Ed. 3. 38. pl. 31. Raſtal's Entries, 43. b. 45. pl. 1. 46. pl. 2. 47. pl. 3. Coke's Entries, 5 Co. 121. b.

[a] can an Appeal of Rape be ſufficient without the Word *Rapuit*; nor [b] an Appeal of Larceny without the word *Cepit*; nor [c] an Appeal of Mayhem without the Word *Mayhemiavit*; nor any [d] of the Appeals above-mentioned without the Word *Felonicè*.

Sect. 78. III. That in every Appeal of Larceny [e] it muſt expreſsly appear whoſe the Goods were that were ſtoln, and in every Appeal of Death [f] who the Perſon was that was killed; becauſe otherwiſe it cannot appear that the Plaintiff is intitled to the Appeal; yet an Indictment *de morte* [g] *cujuſdam ignoti*, or for felonioufly ſtealing [h] the Goods *cujuſdam ignoti*, is good; for it is ſufficient, That the Perſon injured was under the Protection of the Law.

Sect. 79. IV. That in an Appeal of Rape the Fact ſeems to be ſufficiently [i] declared, by ſhewing, That the Defendant *felonicè rapuit* the Woman, without adding the Words *carnaliter cognovit*, or any others tantamount, or firſt ſhewing the particular Manner of the Terror or Violence, and then concluding, That the Defendant *ſic felonicè rapuit*. Alſo it ſeems, [k] That the like general Manner of ſetting forth the Fact, is ſufficient in an Appeal of Larceny; but it ſeems to be uſual, in Appeals of Larceny, to ſet forth the Price of the Things ſtoln; but whether this be neceſſary for any other Purpoſe than to ſhew, That the Crime amounts to Grand Larceny, and to aſcertain the Goods, in Order thereby the better to intitle the Appellant to a Reſtitution, I leave to be conſidered. But [l] in an Appeal of Mayhem it ſeems neceſſary, firſt, To ſet forth particularly in what Manner the Hurt was done, and the Conſequences following it, and then to conclude, That the Defendant *ſic felonicè mayhemiavit* the Appellor. Alſo it ſeems clear, [m] That in an Appeal of Death it is neceſſary, not only from the Statute of *Gloceſter* [n] Ch. 9. which requires, That an Appeal of Death ſhall declare the Deed; but alſo from the Common Law, firſt, To ſet forth in the Count all the ſpecial Circumſtances of the Fact, and [o] then to conclude, That the Appellee *ſic felonicè murdravit* the Party; and this being the Appeal moſt in Uſe at this Day, it may not be improper to ſet down theſe following Rules concerning this Matter.

Sect. 80. I. That every ſuch Count ought to ſet forth in what Part [p] of the Body the Wound was given; in which Reſpect, the ſame Certainty ſeems to be required in Appeals as in Indictments; and therefore, if the Count ſay only that the Wound was given *circa pectus*, it ſeems to be vicious, as it hath been reſolved, [q] That an Indictment in the like Manner uncertain is, becauſe it doth not aſcertain the Part wounded, which, for what appears, might have been the Neck, Arm, or Belly; and for the like Reaſon ſuch Count ſeems alſo to be vicious, if it ſay, That the Wound was in the Hand, or Leg, or Arm, without [r] ſhewing whether it were the right or left; neither [s] is ſuch an Uncertainty holpen by laying other Wounds with ſufficient Certainty, if there be a general Concluſion that the Party died of the Wounds above mentioned, becauſe the Death being as much imputed to the Wound that is inſufficiently laid, as to the others, it appears not but that it might be chiefly owing to that which is inſufficiently laid, and therefore the Whole is inſufficient. But it hath been reſolved, That it is ſufficient in an Indictment of Death, and therefore it ſeems alſo to be ſufficient in an Appeal, to ſhew, That the Wound

[a] S. P. C. 82. Letter B. 24. [b] Letter D. 96. [c] Letter D. 9 Ed. 4 26. 20 H. 7. 7 a. 1 Inſt. 124. a. [d] Fitz. Enditement, 2, 8. S. P. C. 96. [e] Letter B. H. P. C. 207. [f] Supra Sect. 17. [g] S. P. C. 94, 96. Letter C. H. P. C. 206, 207. [h] 20 H. 7. 7 a. 1 Bulſt. 93. Cro. Jac. 20. Dy. 202. pl. 67. [i] Quære 1 H. 6. 1. pl. 1. Contra Fitz. Enditement, 26. Dy. 69. pl. 28. [k] Raſtal's Entries, 53, b. 54, 55. [l] Fitz. Enditement 16. S. P. C. 95. Letter G. 181. b. [m] 22 Aſſ. 94. [n] H. P. C. 207. [o] 22 Aſſ. 94. Fitz. Coro. 159. [p] S. P. C. 94. Letter G. 181, b. 1 Aſſ. pl. 7. Dyer 99 pl. 61. [q] Fitz. Enditement, 9, 12. H. P. C. 207. S. P. C. 95. Letter G. 181, b. Dy. 99. pl. 61. [r] Keilw. 25. b. Moor, 466. [s] 18 Aſſ. pl. 15 Contra 9 H. 6. 45. b. [t] Dy. 202. pl. 67. [u] 11 H. 4. 13. Fitz. Coron. 86. S. P. C. 81. Letter C. H. P. C. 187. 51, 52, 53. 318, 319. [q] 4 Co. 40, b.

[k] See Raſtal's Entries, 53, b. 54, 55. [l] See Raſtal's Entries, 45, 46. and Coke's Entries, 50, b. [m] See Raſtal's Entries, 46, b. 47, &c. Coke's Entries, 53, b. 54, &c. Salkeld, 377. 2 Inſt. 2 Lev. 140, 141. 5 Co. 120, 121, 122. 4 Co. 41, 42. [n] 2 Inſt. 318. [o] 4 Co. 47, a. [p] 2 Inſt. 318. 5 Co. 121, b. [r] 5 Co. 121, b. [s] 4 Co. 40. b.

was given in the left [a] Part of the Belly, or in the left Part of the Side, or in the left Hand, or in the left Arm, or in the Face, or in the Breast, or in the Belly, or even in the Forepart of the Body, in which Case the Word *Body* shall be understood of the Trunk of the Body, between the Neck and Thighs. And it hath been resolved, [b] That where there is such a sufficient Certainty, the Addition of a farther uncertain or unintelligible Description, will do no Hurt; as where a Wound is laid *in sinistra parte ventris circa umbelicum*, &c. in which Case the last Words shall be rejected as abundant and Surplus.

[a] 4 Co. 41. pl. 4. 5 Co. 121. b. Cro. Jac. 95. pl. 23. Con. Cro. El. 137. pl. 10.
[b] 4 Co. 41. pl. 4. H. P. C. 207.

Sect. 81. II. Such Count ought also [c] to shew the Length and Breadth of the Wound, that it may appear to the Court that it was mortal; but it is said, [d] That anciently this was not required: And if a Man be shot, or run through the Body, with a Bullet, or Sword, *&c.* it seems [e] sufficient to say, That the Defendant, with Malice, *&c.* struck the Person killed in such a Part of his Body, and gave him in such Part *Mortale vulnus penetrans in & per corpus*, &c. for this sufficiently shews, That the Wound was mortal. Also in some Cases it is impossible to shew the Length and Breath of the Wound, as where a Limb is cut off, and [f] therefore it is plain, That in such Cases it cannot be required.

[c] S. P. C. 79. Letters C. D. 2 Inst. 318. 4 Co. 40. b. 5 Co. 122. a.
[d] S. P. C. 79. Letters C. D.
[e] 5 Co. 121. b. 122. a.
[f] 2 Inst. 318. 5 Co. 122. a. 4 Co. 41. b. 42. a.

Sect. 82. III. It is not safe, [g] in any such Count, to omit the Word *percussit*, where the Fact will bear it; and by the Authority of some [h] Books this cannot be supplied, in such Cases, by the Words *dedit mortale vulnus*, &c. nor by any other: Yet in *Croke*'s [i] *Reports* this Opinion seems to be questioned, neither do I find any Reason given why the Word *percussit* should be of such absolute necessity, for it is not so much as pretended in *Long*'s [k] Case, which seems to be the chief Foundation of this Opinion, That this is a Word of Art appropriated to this Use; but all that seems there contended for is, That where the Death was occasioned by any external Violence, coming under the Notion of Striking, it must expressly appear, That a Stroke was given. Nor does the Law admit of a less exact Certainty, as to the setting forth the Fact, where the Death was occasioned by any other Means, as by Poison, *&c.* for it hath been resolved, [l] That an Indictment (which in this respect seems not to differ from an Appeal) setting forth, That *J. S.* persuaded the Person deceased to take a certain poisonous Potion under the Notion of a Medicine, and that the deceased, *Nesciens præd' potum cum veneno fore intoxicatum, sed fidem adhibens dictæ persuasioni dicti* J. S. *recepit & bibit* is insufficient, because it doth not expressly say, That the Party received and drank the Poison. And it was also resolved, That the Want of such Certainty is not supply'd by these Words immediately following, *Per quod idem* N. *immediate post receptionem veneni prædicti per tres horas immediatè sequentes languebat & obiit*, &c. and yet there cannot well be a stronger Implication that the Poison was taken and drunk by him; for it being the strict [m] Rule of Law in these Cases to have the Substance of the Fact expressed with precise Certainty, the Judges will suffer no argumentative Certainty whatsoever to induce them to dispense with it. For if they should once be prevailed with to do it in one Case, the like Indulgence would be expected from them in others nearly resembling it, and then in others resembling those, and no one could say where this might end; which could not but endanger the subverting of one of the most fundamental Principles of the Law, by given Room to Judges by Arguments from what the Jury have found to convict a Man of a Fact which they have not found.

[g] Palmer 282. 3 Mod. 202.
[h] 5 Co. 122.
[i] Bulst. 124.
[i] Cro Jac. 635. See H P. C. 207 and Yel. 28.
[k] 5 Co. 122. vide Dy. 99. pl. 63.
[l] 4 Co. 44. b. 3 Mod. 202.
[m] 4 Co. 44 b.

Sect. 83. IV. Such Count ought [a] alſo expreſsly to ſhew that the Party died of the Hurt ſpecially ſet forth; and it hath been reſolved [b] That an Indictment, and from the ſame Reaſon it ſeems that an Appeal, ſetting forth that the Defendant choaked the Deceaſed, *qua ſuffocatione obiit*, inſtead of *de qua ſuffocatione*, &c. is erroneous; yet where the Death was cauſed by divers Poiſons, or Wounds, *&c.* the Count may ſay in general that the Party died of the ſeveral Poiſons or Wounds above mentioned, without [c] ſaying That he died of any one of them in particular; for perhaps the Truth of the Caſe might be, That none of them alone, but all together, cauſed the Death. Or [c] the Count in ſuch Caſe perhaps may ſay, That the Party died of the firſt Poiſon or Wound, and that he would have died of the ſecond if he had not died of the firſt, and alſo that he would have died of the third, if he had not died of the two firſt.

[a] 2 Inſt. 318.
[b] 1 Rol. Rep. 137. pl. 20.
[c] 3 Inſt. 50, 135. Quære 4 Co. 40, b.
[c] 44 Ed. 3. 38. pl. 31. 40 Aſſ. pl. 25. S. P. C. 80.

Sect. 84. V. If the Killing were with a Weapon, the Count muſt [d] ſhew with what Weapon in particular, and yet if upon the Evidence it ſhall appear that the killing was not by ſuch Weapon, but by ſome other, the Variance [e] is immaterial, and the Appellee ought to be convicted, as ſhall be ſhewn more at large under the Chapter of *Evidence*. And if the killing were not by a Weapon, but by ſome other Means, as by poiſoning, drowning, ſuffocating, burning, or the like, the Count [f] muſt ſet forth the Circumſtances of the Fact as ſpecially as the Nature of it will admit. But in ſuch Caſes, where no Weapon was uſed, it cannot but be abſurd to require the Mention of one in the Appeal, and therefore the Statute of *Glouceſter* Chap. 9. which directs generally, That in all Appeals of Death the Weapon muſt be ſet forth, is to be intended only [g] of ſuch Killing in which a Weapon was uſed: For the Law is ſo far from requiring it in other Caſes, that it will not ſuffer an Appeal of Killing by a Weapon to be maintained by Evidence of Killing by any other Means in which no Weapon was uſed; neither will it ſuffer an Appeal of Killing by any of thoſe Means without the Help of a Weapon, to be maintained by Evidence of Killing by a Weapon, as ſhall alſo be ſhewn more at large in the Chapter above referred to.

[d] Letter C. 4 Co. 40. b. Raſtal's Entries 46. pl. 2. 47 pl. 3, 4, 49. pl. 6. 51. pl. 11.
[d] 2 Inſt. 318.
[e] 3 Mod. 158. See the Stat. of Glouceſt. Chap. 9.
[e] 2 Inſt. 319. H. P. C. 265. 9 Co. 67.
[f] 2 Inſt. 318, 319.
[g] 2 Inſt. 318, 319.

Sect. 85. It hath been adjudged, [h] That the Words *vi & armis* are not neceſſary in ſuch Appeal, becauſe they are ſo fully implied.

[h] Smith and Bowen. Mich. 7 An.

Sect. 86. As to the third Point, *viz.* In what Manner the Count in Appeal muſt ſet forth the Circumſtances of Time and Place, it is enacted by the Statute of *Glouceſter*, Chap. 9, *That if an Appeal declare the Deed, the Year, the Day, the Hour, the Time of the King, and the Town where the Deed was done, and with what Weapon, the Appeal ſhall ſtand in Effect*, &c. And tho' this more particularly relate [i] to Appeals of Death, yet it ſeems alſo to be generally a good Rule as to the Circumſtances of Time and Place in other Appeals, and therefore I ſhall conſider them all together, and firſt premiſe [k] That no Omiſſion of any of theſe Circumſtances, where the Law requires them to be expreſsly ſet forth, can be aided by the Conviction of the Defendant; and then for the better underſtanding in what Caſes the Law requires them to be expreſsly ſet forth, I ſhall endeavour to ſhew what Certainty the Count in every Appeal ought to ſhew.

[i] 2 Inſt. 317.
[k] 1 R. A. 781 Letter N.

1. The Hour.
2. The Day.
3. The Year and Time of the King.
4. The Place where the Deed was done.

Sect.

Sect. 87. As to the first of these Particulars, *viz.* With what Certainty the Count in Appeal ought to set forth the Hour, it is observable that all the [a] Precedents of such Counts (excepting only one,[b]) in Appeals of Larceny in *Rastal*'s Entries, which seems to be the only Book of Authority in which any such Counts are to be found; and also all the Precedents in *Coke* and *Rastal* of such Counts in Appeals of [c] *Mayhem*, take Notice of the Hour, as well as those in Appeals of Death; [d] and therefore certainly it is not safe wholly to omit it; yet it hath been holden, [e] That such an Omission is not fatal, even in an Appeal of Death, because the Common Law did not require the mention of the Hour, and the Statute above mentioned is in the Affirmative. Yet if the Hour as well as Day be set forth in the Allegation of the Offence of the Principal, it is said to be fatal to mention the Day only in the Allegation of the Offence of the Accessory. But it seems that there is no Necessity in any Case precisely to alledge, That the Fact was done at such an Hour, but that it is sufficient to say, That it was done about such Hour, as appears from every [f] one of the Precedents in *Coke* and *Rastal*, in which the Hour is mentioned, and also from other [g] good Authorities; yet we find the contrary Opinion holden by three Judges against two in *Bulstrode*'s [h] Reports. But it seems [i] certain that a Mistake of the Hour will not be material upon Evidence.

Sect. 88. As to the second of the above mentioned Particulars, *viz.* With what Certainty the Count in Appeal ought to set forth the Day, There can be no Doubt but that every such Count must set forth the Day on which the Fact was done, as appears from all the Precedents cited in the foregoing Section; and also from the common Form of all other Declarations in all Actions whatsoever, as well as of Indictments, for which it is needless to cite Authorities. And if the Fact happened in the Night, it seems [k] most proper to alledge it in *nocte ejusdem diei.* But it is said not to [l] be sufficient to alledge the Fact done about such a Day, or between such a Day and such a Day, but that the very Day must be precisely set forth. And it seems to be insufficient to alledge [m] it on the Feast-Day of such a Saint, without an Addition, if there be another Saint of the same Name, as on *St. John*'s Day, without shewing which Saint is meant, *viz.* the Baptist or Evangelist. Also [n] it seems to be erroneous to set forth the Fact on an impossible Day, as on the thirty-first of *June*, or thirtieth of *February*, for this is of no more Effect than to mention no Day at all. Also it seems clear that an Appeal of Death must not only set forth the Day when the Hurt was given, but also the Day when the Party died of it, as appears from all the Precedents [o] of this Kind both in *Coke* and *Rastal*; and also from the manifest Reason of the Thing, [p] that it may appear that the Party died within the Year and Day after the Stroke, in which Case [q] only the Law intends that the Death was occasioned by it. And it is [r] said not to be sufficient to alledge, That the Defendant assaulted the Party at a certain Day, and feloniously struck him, without expressly adding, That he struck him *adtunc & ibidem*; and yet both Sentences being joined with the Copulative, it is the most natural Import of the whole, That the Stroke and Assault were both at the same Time, *&c.* and such Certainty seems to be sufficient in Declarations [s] in civil Actions, and even in Indictments [t] of Trespasses. But in Indictments and Appeals of Death a more express Certainty is said to be required, because the Stroke which caused the Death, being a Crime

[a] Rastal's Entries 53. pl. 1, 2, 3, 54. pl. 4, 5.
[b] Rastal's Entries, 55. pl. 6.
[c] Coke's Entries, 50. b. 51. pl. 2. 52. pl. 3. Rastal's Entries, 45. pl. 1, 2, 3, 4.
[d] Coke's Entries, 53. pl. 4. 56. pl. 5. 57. pl. 6. 59 pl. 7. Rastal's Entries, 43. b. 46 pl. 31. 47. pl. 3, 4 48. b. 49. pl. 6. 50. pl. 10, *&c.*
[e] S. P. C. 80. b. 1 Bul. 82. H. P. C. 187.
[f] Coke's Entries, 50. b. 51. pl. 2. 52. pl. 3. 53. pl. 4. 56. pl. 5. 57. pl. 6. 59. pl. 7. Rastal's Entries, 43. b. 45. pl. 1, 2, 3, 4. 46. pl. 2. 47. pl. 3, 4 48. b. 49. pl. 6. 50. pl. 10. 57. pl. 11. &c.
[g] 2 Inst. 318. Salk. 59. pl. 2.
[h] 1 Bulst. 77. 80, 81, 82, 83. Vide 3 Mod. 158.
[i] H.P.C. 264. 2 Inst. 318.
[k] 2 Inst. 318.
[l] 2 Inst. 318.
[m] Bro. indict. 47. 3 H. 7. 5. pl. 2.
[n] Moore, 555. pl. 723.
[o] See Citations in the precedent Section
[p] 2 Inst. 318. Bro. Indictment. 41.
[q] Book 1. Ch. 31. Sect. 9, 10.
[r] Dy. 28. as as in the Margin. Dy. 8. pl. 28. See B. 1. Ch. 64. Sect. 42. Keilw. 100 Quære.
[s] Cro. Jac. 362. 443.
[t] Cro Ca. 271. Cro. Jac. 41. See B. 1. Ch. 64. Sect. 42. 1 Rol. Rep. 295.

of

of a different Nature, and much higher than the Aſſault, may be well enough intended to have happened at a different Time; and therefore the preciſe Time of each muſt be certainly expreſſed. And even this may be vitiated by a Repugnancy in the Concluſion; for if the Aſſault and Stroke be alledged in the Premiſſes on the tenth of *December*, and the Death ſubſequent on the twentieth of *December* following, and then it be alledged in the Concluſion, that the Defendant in ſuch manner felonioufly murdered the Party on the tenth of *December* aforeſaid, the whole is naught for the Repugnancy; [a] becauſe the Party could not be ſaid to have been murdered, 'till he was dead: And tho' to ſome Purpoſes by a Fiction of Law the Offence of the Defendant after the Death of the Party, is puniſh'd as a Felony from the time of the Stroke; yet in Truth and Propriety of Speech (which muſt be obſerved in legal Proceedings) it is not a Felony but only a Treſpaſs 'till the Death; yet if in ſuch Concluſion it had been alledged that the Defendant in ſuch Manner felonioufly murdered the Party on the twentieth of *December* aforeſaid, it had been ſufficient. But it is ſaid [b] to be the better Way to conclude generally, That the Defendant in ſuch Manner felonioufly murdered the Party. And it is certain [c] that a Miſtake of the Day will not be material upon Evidence.

[a] 4 Co. 42. 47. H. P. C. 207. 2 Inſt. 318. Noy 45. Hetley 35. Dy 50. pl. 9. 10. Quære Cro. El. 739, pl. 12.

[b] 4 Co. 42. 47. 2 Inſt. 318.

[c] H. P. C. 264. 2 Inſt. 318.

Sect. 89. It hath been holden that an Allegation of the Day, *prima facie* ſomewhat uncertain, may be holpen by the apparent Senſe of the whole; as where [d] it is alledged, That the Principal ſuch a Day made the Aſſault and gave the Stroke, and that the Party died on ſuch a ſubſequent Day, *&c.* and that *A. B.* was *adtunc & ibidem abettans* the ſaid Principal to do the Felony and Murder aforeſaid, in which Caſe it is ſaid that the Words) *adtunc & ibidem*, from the manifeſt Import of the whole, ſhall be referred to the Time of the Stroke; becauſe by that only the Felony which *A. B.* is charged to have abetted was done. Yet if *A. B.* had been ſaid to have been preſent at the Time of the Felony and Murder aforeſaid, *ſcilicet*, on the Day of the Stroke, *tunc & ibidem* abetting the Felony and Murder aforeſaid, *&c.* it ſeems [e] that the Appeal is inſufficient as to the ſaid *A. B.* for the Repugnancy; becauſe he is expreſsly alledged to have been preſent, and to have abetted the Principal, at the Time of the Felony and Murder, which muſt be taken for the Time of the Death, by which the Offence, which was before but a Treſpaſs, became Felony and Murder; but by being preſent at the Time of the Death, it is impoſſible he could abet a Stroke given ſo long before, and therefore it is repugnant and inconſiſtent in ſuch a Manner to alledge it. Nor is ſuch a Repugnancy any way holpen by the ſubſequent Allegation of the very Day of the Stroke, coming after the Word *Scilicet*, for it is apparent that the Time of the Felony, could not be on the Day of the Stroke, and therefore it rather adds to than helps the Fault to alledge that it was. But [f] the beſt Way of alledging ſuch Abatement had been to have ſet forth, That the ſaid *A. B.* was *præſens, auxilians*, &c. *ad feloniam & murdrum prædictum in forma prædicta faciend'*.

[d] Vide Dyer 164. 60. b. Cro. E. 176. Quære Cro. El. 739 pl. 12.

[e] 4 Co. 42.

[f] 4 Co. 42.

Sect. 90. As to the third Particular, *viz.* With what Certainty the Count in Appeal ought to ſet forth the Year and Time of the King, there can be no Doubt but that every ſuch Count muſt expreſsly ſet forth in what Year the Fact was done, as appears from the known Form of all other Counts, and alſo of Indictments. And in an Appeal of Death it is certainly neceſſary [g] to ſet forth not only the Year in which the Stroke was given, but alſo that in which the Death happened, that it may appear that the Death happened within the Year and Day after the Stroke. But it ſeems clear from all the Precedents, That it is ſufficient to ſhew in what

[g] 2 Inſt. 318. 319. Bro. Indictment 41. Book 1. Ch. 31. S. 9 10

Year of the King's Reign the Fact was done, and the Death happened, without ſhewing the Year of the Lord. Alſo it hath been adjudged, [a] that it is ſufficient to alledge the Fact in ſuch a Year of ſuch a King, without ſaying it was in ſuch a Year of his Reign, becauſe it is clearly implied.

Sect. 91. As to the fourth Particular, *viz.* With what certainty the Count in Appeal ought to ſet forth the Place where the Deed was done, there can be no doubt but that every Count in an Appeal of Death muſt ſhew [b] the Place where the Death happened, as well as that where the Hurt was given, and this with the ſame [c] preciſe Certainty and Freedom from Repugnancy [d] as is required in Relation to the Time of the Death and Hurt, for which I ſhall refer the Reader to the 89th and 90th Sections of this Chapter, wherein what is ſaid in Relation to the Time of the Hurt and Death is equally applicable to the Place. Alſo it ſeems that a Miſtake of the Place is not [e] material upon Evidence upon not Guilty pleaded, any more than a Miſtake of the Time, provided the Fact be proved at ſome other Place in the ſame County.

Sect. 92. But it ſeems to be not only neceſſary in an Appeal of Death to alledge ſome Place both of the Death and Hurt, and in every Count in every other Appeal to alledge ſome Place; where the Fact was committed, but alſo that ſuch Allegation be in a proper Place for the better Underſtanding whereof I ſhall premiſe, That if the Truth will bear it, it is ſafeſt [f] to lay it in a Town, as the Statute of *Glouceſter* above-mentioned directs; but if it were done out of a Town, it ſeems that you may lay it in any other Place from whence a Viſne may come; in Relation to which Matter the Law being in great Meaſure ſuperſeded in civil Actions by the Statute *For the Amendment of the Law*, and chiefly in Uſe in criminal Cauſes, it may not be improper in this Place more fully to conſider it, and for that Purpoſe I ſhall lay it down as a good general Rule, That a Viſne may come from any Place, which is of ſo ſmall a Compaſs, that all who live in or near it may reaſonably be preſumed to have ſome Knowledge of the Perſons living in it, and therefore are eſteemed the moſt proper Judges of the Facts done within its Limits, as being moſt likely to be proved by Witneſſes, and charged upon Perſons with whoſe Integrity and Reputation they are beſt acquainted. And upon this Ground it hath been adjudged, That a Viſne may come not only from a Town, but from [g] a Ward, a [h] Pariſh, Hamlet, [i] Burgh, Manor, [k] Caſtle, [l] or even from a Foreſt, [m] or other Place known [n] out of a Town. Alſo it ſeems [o] clear that whenſoever a Place is generally alledged in Pleading, the Law will intend it to be a Vill unleſs it be mentioned with ſome Addition which ſhews the contrary; or [p] be alledged within a City or Vill, in which Caſe it would be abſurd to take it for a Vill of it ſelf; yet [q] if in Truth there be no ſuch Town, nor Hamlet, nor Place known out of a Town; or [r] if a Fact alledged in a Foreſt, were done in ſome Vill in the Foreſt not mentioned in the Record, the Defendant may plead it in Abatement. Alſo if a Fact done in a Vill within a Pariſh which contains divers Vills, be in the Count in an Appeal alledged generally in the Pariſh, or [r] a Fact done in a City, which contains divers Pariſhes, be in the Count in an Appeal alledged generally in the City, it ſeems [s] that the Defendant may plead ſuch Matter in Abatement, for otherwiſe he could take no Advantage of the Inſufficiency of the Allegation, becauſe the Place named as it ſtands

[a] Lev. 140. See 1 Sid. 140.

[b] Hetl. 35. Cro. El. 137. pl. 10. 738. pl 11. 739. pl. 12.

[c] Dy. 68. pl. 28.

[d] Noy 45. Dy. 50. pl 9. 10. Cro. Eliz. 196. pl. 13.

[e] H. P. C. 264, 265. Salk. 288.

[f] Fitz. Coro. 80. 2 Inſt. 319. 3 Mod. 158. Salk. 59. 60.

[g] Yel. 159. 1 Sid. 178. Cro. Jac. 222.

[h] 6 Co. 14. Co. Litt. 125. b. Salk. 60.

[i] Co. Lit. 125. b. Cro. El. 866. 1 Sid. 326.

[k] 2 Rol. A. 612. pl. 6, 7. 613. pl. 1. 614 pl. 8. 618. pl. 2. Co. Litt. 125. Cro Jac. 405.

[l] 2 Rol. A. 618. pl. 1. 621. pl. 21 Co. Lit. 125. b.

[m] Cro. El. 200. pl. 26. 1 Sid. 326. 2 Rol. A. 621. pl. 26. Bro. Appeal 19. Vide Co. Lit. 125. b. Con. Bro. Appeal 127.

[n] 6 H. 7. 3. pl. 1. Co. Litt. 125. a. b. 2 Inſt 319. 1 Sid. 326.

[o] Bro. Pleadings 61. Co. Litt. 125. b. 2 Rol. A. 54. pl. 30, 31, 32. 1 Sid. 88. con. 1 Sid. 326.

[p] Cro. El. 732. 1 Sid. 326.

[q] Bro. Pleadings 61. 6 H. 7. 3. pl. 1. 2 Rol. A. 621. pl. 26. 7 H 4 27. a. See 2 Rol. A. 616 pl. 2, 3, 4, 5, 6, 7. 1 Sid. 88.

[r] Cro. El. 200. 7 H. 4. 27 a. 2 Rol. A. 621. pl. 26.

[s] See the Caſes cited under Letter O. 7 H. 4. 27. a Salk. 59. 60. Co. Litt. 125. b. 4 Co. 14. b. 2 Inſt. 319.

on

on the Record, muſt, till the Contrary be ſhewn, be intended to contain no more than one Town, or Pariſh, on which Suppoſition a Viſne may well come *de vicineto* [a] *civitatis*, which does not exclude the City, but takes in the City and its Neighbourhood within its Juriſdiction, whether ſuch City be within a County, [b] or be a County of itſelf; excepting only the City of [c] *London*, from whence it ſeems that no Viſne can come, not only by Reaſon of the Largeneſs of its Extent, but alſo becauſe it hath been the conſtant Uſage of Pleading to ſhew the Ward and Pariſh in which a Fact alledged [d] in *London*, was done.

Sect. 92. It hath been adjudged that no [e] Viſne can come from the *Wild* of *Suſſex*, not only by Reaſon of the Largeneſs of its Extent, but alſo becauſe it ſhall be taken for a Wood without Inhabitants, and therefore it would ſeem inconſiſtent to award the Return of a Jury from it. And yet it hath been holden [f] that a Viſne may come from a Park; alſo it ſeems to be the general Opinion, That a Viſne may come from a Foreſt, as hath been more fully ſhewn in the Precedent Section, from whence it may plauſibly be argued that it may come as well from ſuch a *Wild*, ſuppoſing it to be a Wood. Alſo it ſeems [g] to be queſtionable whether a Viſne may not come from a Walk in a Foreſt, being alledged as a Place in which a Fact was done; but it ſeems clear that no Viſne can come from it, if it be alledged only as a Liberty, for that no Viſne can come from a Thing incorporeal, [h] but only from a Place. Alſo it hath been holden that no Viſne [i] can come from the Scite of a Manor, perhaps for this Reaſon, becauſe it doth not properly ſignifie a Place, but rather the Limits and Scituation of a Place.

Sect. 93. As to the fourth Point, *viz.* Whether one and the ſame Count in Appeal ought to be againſt thoſe who do not appear, as well as againſt thoſe who do appear, and againſt the Acceſſories as well as the Principals. It is ſaid [i] by Sir *Matthew Hale*, That in an Appeal againſt *A. B.* and *C.* if *A.* only appear, yet the Plaintiff ought to count againſt them all, by the better Opinion. And the like ſeems alſo to be holden by Sir *William Staundforde* [k] and *Brook* [l]; yet the Point adjudged in the Principal [m] Caſe, which ſeems to be the chief Foundation of theſe Opinions, ſeems to be no more than this, That where an Appellant hath had Judgment and Execution in one Appeal, he ſhall not afterwards have another againſt Perſons not named in the firſt. And all the Precedents that I can find, either in *Coke* [n] or *Raſtal*, [o] of Counts in Appeals, wherein ſome of the Defendants have not appeared, do indeed mention the Perſons abſent, as well as thoſe preſent, and ſhew in what Manner they were guilty, yet are all of them expreſs that the Appellant *inſtanter appellat* thoſe that appear only; and that he would in like Manner appeal thoſe that are abſent, if they were preſent; by which it ſeems clearly to be implied, That when they ſhall appear there ſhall be another Declaration againſt them, and that the preſent Declaration is eſteemed only as a Declaration againſt thoſe that do appear. Neither do I find any Difference in the Precedents above-mentioned, as to the Form of ſuch Counts in Relation to this Matter, where the Perſons not appearing are Acceſſories, from that wherein they are Principals. But whether the omitting of a Perſon in one Appeal be always a good Bar to the charging of him in another, ſhall be conſidered in the following Part of the Chapter, wherein I ſhall treat of the Nature of Pleas in Bar to Appeals.

Sect. 94. As to the third Point, *viz.* How the Appellant may be nonſuited, it is generally holden in ſome Books, [p] That by the Common Law,

[a] 2 Rol. A. 622. pl. 31, 32, 35, 36, 37, 38. 623. pl. 41, 42. 8 H. 5. 10. pl. 20. Cro. Jac. 307, 308. Con. S. P. C. 155. b.

[b] See the Authorities cited under Letter M.

[c] 1 Sid. 178. pl. 10. Cro. Jac. 307, 308

[d] 2 Rol. A. 622 pl. 39. Cro Jac 150. pl. 10. Quære Cro. El. 732. Con. S. P. C. 154. Letter C. 2 Rol A. 617. E. 1.

[e] 1 Sid. 88. 2 Rol. 617. pl. 2. Hob. 266.

[f] 1 Syd. 327.

[g] 2 Lev. 307. contra 1 Sid. 326.

[h] 2 Lev. 307. Contra 1 Sid. 326.

[i] 1 Sid. 327. 2 Rol. A. 618. pl. 3. 1 H.P.C. 188.

[k] S. P. C. 65. Letter C.

[l] Brook Appeal 28.

[m] 9 H. 4. 1. pl. 7. See 4 Co. 47. Dyer 120. pl. 10.

[n] Cokes' Entries 50. b.

[o] Raſtal's Entries 46. pl. 2. 47. pl. 4. 50. pl. 10. 51. pl. 11. 13. 15. 53. pl. 2, 3, 54. pl. 4. See 47 Aſſ. pl. 6.

[p] Bro. Nonſuit Co. Litt. 139 b 1 Rol. A. 131. E. pl. 3, 4, 5. 132. pl 6, 7, 8, 9, 10. 3 Ed. 4 11. b.

Contra Fitz. Nonſuit. 15 34. Quæro Bro. Nonſuit. 6. 20 H. 6 44. pl. 30. 2 Bulſt. 19.

if a Plaintiff in any Action whatsoever be demanded at any Day of Continuance before Judgment, and do not appear, either in [a] proper Person, or by Attorney or Guardian, as the Law requires, he shall be nonsuited, whatsoever [b] Excuse he may have for his Absence. But it is enacted by 2 *H.* 4. 7. *That if the Verdict pass against the Plaintiff, the same Plaintiff shall not be nonsuited.* And since the Statute it hath been adjudged [c] That if a Defendant in an Appeal of Murder be found guilty of Manslaughter only, the Appellant cannot be nonsuited; but it doth not appear whether this Resolution be grounded on the said Statute, or on the Common Law; for it seems difficult to maintain that such a Verdict which finds the Substance of the Fact shall be said to pass against the Appellant, in which Case only the Nonsuit is taken away by the Statute. And therefore perhaps a Nonsuit in this Case may not be suffered by the Common Law, which seems not to have permitted a Nonsuit after a full Verdict, except in such Cases only whereupon some Doubt remained with the Court, as may be reasonably argued from the Authorities above cited under Letter. But it seems that an Appellant may be nonsuited after a special [d] Verdict, or after a Demurrer [e] and Argument thereupon.

Sect. 95. As to the fourth Point, *viz.* For what Faults the Writ may be abated, I shall premise that in Order to take Advantage of a Defect in the Writ it self, the Appellee [f] ought to demand Oyer of it, which he must do in open [g] Court. And for the better understanding for what Faults such Writ shall be abated, I shall consider the following Particulars.

1. Where it may be abated by the Court *ex Officio.*

2. Where upon the Exception, or Plea of the Party, but not without such Exception or Plea.

4. What Defects of this Kind may be amended, which without such Amendment might abate the Writ.

As to the first Particular it seems, That the Writ may be abated by the Court *ex Officio*, [h] for the following Faults, whether the Party take Notice of them or not; as,

Sect. 96. I. [i] Where a Writ or Declaration wants those Words of Art which are appropriated by Law for the Description of the Offence; as where an Appeal of Burglary [k] has the Word *Burgaliter* instead of *burglariter*, or *burglariter*; or an Appeal of Rape wants the Word *rapuit*, [l] or any Appeal wants the Word *Felonice.* [m]

Sect. 97. II. Where the Declaration varies from the Writ; as [n] by laying the Offence in the Reign of a present King, where the Writ supposed it to have been in the Reign of a former King. Or by giving the Defendant a Name different from that in the Writ; as where the Writ [o] calls him *A. B.* of *C.* Alderman, and the Declaration *A. B.* of *C.* Esquire. Or where the Declaration is otherwise [p] defective in not pursuing the Writ, or in not setting forth both the Substance [q] and Circumstances [r] of the Fact with that Certainty which the Law requires: Or in [s] laying the Offence in a different Country, from that in which the Writ was brought.

Sect. 98. III. Where [t] the Declaration doth not conclude *contra formam Statuti* in such Cases where by Law it ought.

Sect. 99. IV. Where the Sense is defective for want of a material Word in the Writ; as [u] if the Conclusion be *ibi hoc breve*, &c. without the Word *habeas*; Or where there is a false Concord in the Writ, as *hos* [x] or *hanc breve*; or the singular [y] Number instead of the Plural; or (as some [z] seem to hold generally) any other false *Latin*; or even the Use

[a] Vide supra Sect. 74.
[b] Noy. 88. Larc. 173. Vide Supra Sect. 30.
[c] Moor. 407. pl. 546. Cro. El. 465.
[d] 2 Jon. 1.
[e] Co. Lit. 139. b. 2 Jones 1.
[f] See 20 H. 6. 44. pl. 30. and the Authorities cited under Letter E. 2 Bulst. 19. 3 Bulst. 243.
[g] Between Widdrinton and Charlton agreed. Mich. 10 Annæ.
[h] Finch of Law. 226. 2 Danv. Abr. 252. Supra Sect. 42.
[i] Vide supra Sect 77.
[k] 4 Co. 39.
[l] Supra Sect. 77.
[m] Supra Sect. 18, 77.
[n] Fitz, Brief 219. 236.
[o] Yel. 120.
[p] Supra Sect. 75.
[q] Supra Sect. 76, &c.
[r] Supra Sect. 86, &c. Cro. El. 196.
[s] Supra Sect. 35, 47. 71. Bro. Appeal 38.
[t] Supra Sect. 60.
[u] Fitz. Coro. 121. S. P. C. 82. Letter A.
[x] 9 H. 7. 16. pl. 8.
[y] 10 Ed. 3. 1. pl. 2. [z] H. P. C. 189. S. P. C. 82. Letter A. 5 Co. 121.

of a Word which is not *Latin*, tho' [a] by the Change or Addition of a Letter it might be made ſo. But it ſeems that ſuch Faults in the Declaration are not fatal if the Writ or Bill on the File be right, as ſhall be ſhewn more at large in the following Part of this Chapter.

[a] 2 H. 4 8. pl. 35.

Sect. 100. V. Generally where the Writ, or Declaration are any otherwiſe defective in not obſerving the legal Form, as [b] where in a Writ of Appeal ſued by Husband and Wife, the Concluſion is in the Name of the Wife only: Or where the Writ omits [c] either the Name of Baptiſm, or Surname, of the Appellant or Appellee, being under the Degree of Nobility, which alone can give ſo high [d] a Name of Dignity as to ſupply the want of a Surname.

[b] Fitz. Brief 252.

[c] Finch of Law 253. 27 H. 6. 3. pl. 24. 2 Inſt. 665.

[d] Finch 253. 8 Ed. 4. 24. pl. 2. 2 Inſt. 666. 25 Ed. 3. 39. pl. 6.

As to the ſecond Particular, *viz.* Where the Writ may be abated upon the Plea or Exception of the Party, but not without ſuch Plea or Exception, I ſhall endeavour to ſhew,

1. Where it may be ſo abated for the want of fifteen Days between the *Teſte* and the Return of the Writ.
2. Where for a *Miſnoſmer* or wrong Addition
3. Where for a Defect in the Addition of the Appellant or Appellee.
4. Where for the Multiplicity of Action.
5. Where for making of *J. S.* a Defendant, when there is no ſuch Perſon.
6. Whether the Defendant may have more than one of ſuch Pleas or Exceptions.

Sect. 101. As to the firſt Point, *viz.* Where a Writ of Appeal may be abated upon the Exception or Plea of the Party for the want of fifteen Days between its *Teſte* and Return. If the Party, before he hath pleaded in chief, do ſpecially ſhew to the Court ſuch a Defect in the Writ, the later Authorities [e] ſeem to incline that it ought to be abated, becauſe the Writ is the Foundation of the whole Proceeding, and the Law ſeems to be in nothing more curious than in ſtrictly keeping up its legal Forms. Yet it hath been reſolved, [f] That ſuch a Defect is ſalved by the Party's coming in and pleading in chief without taking Advantage of it: Alſo it hath been adjudged, That where the Original is right, all Defects in the Meſne Proceſs are ſalved by the Party's Appearance, as ſhall be ſhewn more at large in the Chapter concerning Proceſs.

[e] Salkeld 63. pl. 4. vide 2 Inſt. 667. Cro Jac 424. pl. 8. 1 Ventris 7. 1 Sid. 406. contra 12 Ed. 4. 11. Bro. Error 169.

[f] Salkeld 63 pl. 4.

Sect. 102. As to the ſecond Point, *viz.* Where a Writ of Appeal may be abated, upon the Exception or Plea of the Party, for a *Miſnoſmer* or wrong Addition, it ſeems to be agreed; [g] That if there be a Miſtake in the Writ or Declaration as to the Name of Baptiſm [h] or Surname [i] of the Appellant [k] or Appellee; or [l] as to the Town, Pariſh or County, Eſtate, Degree or Myſtery, whereof they are ſaid to be, as where [m] one who is neither by Birth, Office, Creation or Reputation an Eſquire, or Gentleman, is named with either of thoſe Additions; or where a Gentleman by Birth, who follows a Trade or Husbandry, is named [n], with the Addition of the Trade or Husbandry, and not of Gentleman; or where a Peer, who has more than one Name of Dignity, is not named [o] by the moſt Noble; or where a Gentleman or Gentlewoman [p] is named Spinſter; or a Yeoman [q] is named Gentleman; or [r] if there be no ſuch Town, Pariſh nor Hamlet, nor Place known out of a Town, as that whereof either the Appellant or Appellee are ſaid to be; and the Appellee before [s] Imparlance, plead ſuch Matter in Abatement, and thereon Iſſue is joined and found for him,

[g] 35 H. 6. 55. 10 Ed. 4. 12. pl. 10. 2 Inſt. 667. 668. [h] 2 Inſt. 668. 6. Co. 67. [i] 14 H. 6. 15. 668, 669. [k] 2 Inſt. 669. [l] 2 Inſt. 668, [m] 5 H. 7. 16. pl. 7. 10 Ed. 4. 16. pl. 19. Raſtal's Theloal. Lib. 11. Chap. 4. Sect. 19. [n] Salkeld 59. [o] Finch 434. 21 Ed. 4. 7. 2. b.

[h] 9 H. 5. 1 pl. 3.

[i] H. P. C. 243. Raſtal's Entries 49 51. b. 54 pl. 4. See the Chapter concerning Pleas to Felony.

[k] 9 H. 5. 1. pl. 3.

[l] Bro. Appeal 44. Raſtal's Entries. 108. 11 H 6. 11 pl 25. pl. 51. 2 Inſt. Entries 108.

the Writ ought to be abated. And it ſeems [a] alſo to have been holden, That if the Appellant after Imparlance confeſs that he hath brought his Appeal by a wrong Name, the Writ ſhall be abated: But it is ſaid [b] to be no Fault to give an Eſquire the Addition of Gentleman, *& ſic è converſo.* Alſo if one [c] who is uſually known and called by the Surname of *B.* be ſo named in the Appeal, and the Appellee plead that his Name is *C.* and not *B.* and the Appellant reply that the Appellee is, and at the time of the Purchaſe of the Original, was as well known by the Name of *B.* as by the Name of *C.* and this be confeſſed and found for him, it avoids the Plea of the Miſnoſmer. And if one who hath his uſual Abode at *B.* and hath been ſometime ſeen at *C.* be named of *C.* in an Appeal, it hath been queſtioned [d] whether this be ſuch a Fault as will abate the Writ; becauſe ſometimes Appellees may not have any known Dwelling; but if that happen to be the Caſe, ſurely it is ſafeſt to reply it, and then there ſeems to be little doubt but it may make good the naming of the Party of any Place wherein he has at any time been. And if a Place where he dwells, and is a Houſe-Keeper, and alſo another Place where he keeps his Wife and Family be well known, it ſeems that the Writ may name him of either of ſuch Places, or perhaps of both of them, but is abateable unleſs it name him of one of them.

[a] 9 H. 5. 1. 3. pl. Bro. Appeal 38.
[b] Bro. Addition 44.
[c] Raſtal's Entries. 50. pl. 10. 54 pl. 4.
[d] 1 Sid. 325. Vide 10 Ed. 4 12, pl. 10. 4 H. 6. 4. pl. 9

Sect. 103. As to the third Point, *viz.* Where a Writ of Appeal may be abated by the Exception or Plea of the Party, for a Defect in the Addition of the Appellant or Appellee, it ſeems that the Common Law in no Caſe [e] requires any other Deſcription of an Appellant or Appellee, but by their Name of Baptiſm and Surname, unleſs they be of the Degree of a Knight, [f] or of ſome higher Dignity; in which Caſes, whether the Name of Dignity be ancient, or (as ſome ſay [g]) of a new Creation, as that of Baronet, *&c.* it ought to be added to the Name of Baptiſm and Surname; and if it be of the Degree of Nobility, it ought [h] to ſupply the Place of the Surname. And it ſeems that the Law was [i] ſo curious in this Particular, that if a Plaintiff in any Action gained a new Name of Dignity hanging a Writ, he made it abateable, but this Inconvenience is remedied by 1 *Ed.* 6. 7. Sect. 3. by which it is enacted, *That if any Plaintiff in any Manner of Action ſhall be made a Duke, Archbiſhop, Marqueſs, Earl, Viſcount, Baron, Biſhop, Knight, Juſtice of either Bench, or Serjeant at Law depending the ſame Action, that ſuch Action for ſuch Cauſe ſhall not be abateable or abated.* But it hath been holden [k] that the Dignity of a Baronet is not in this Statute, becauſe there was no ſuch Dignity at the time of the making of it.

[e] 2 Inſt. 665. 666. 11 H. 4. 40. pl. 3. 11 H. 6. 11. pl. 25. 10 Ed. 4. 16. pl. 19.
[f] 11 H. 4. 40. pl. 3. 14 H. 6. 14. b.
[g] Hob. 129. 2 Rol. A. 469. pl. 10. 2 Inſt. 666, 667. contra Latch. 169.
[h] Supra Sect.
[i] 32 H. 6. 29. b. Contra 24 E. 3. 25. pl. 14. 26 pl. 21. 25 Ed. 3. 39 pl. 6.
[k] 1 Sid. 40. Littleton's Rep 81. Cro. Ca. 104.

Sect. 104. To prevent [l] the Inconvenience of troubling one Perſon for another, which cannot but often happen if there be no other additional Deſcription of the Defendant, it is enacted, by 1 H. 5. Chap. 5. *That in every original Writ of Actions perſonal, Appeals, and Indictments, and in which the Exigent ſhall be awarded, to the Names of the Defendants in ſuch Writs Original, Appeals and Indictments, Additions ſhall be made of their Eſtate or Degree, or Myſtery, and of the Towns or Hamlets, or Places and Counties, of the which they were or be, or in which they be or were converſant. And if by Proceſs upon the ſaid Original Writs, Appeals or Indictments, in the which the ſaid Additions be omitted, any Outlawries be pronounced, that they be void, fruſtrate and holden for none. And that before the Outlawries pronounced, the ſaid Writs and Indictments ſhall be abated by the Exception of the Party, wherein the ſame the ſaid Additions be omitted.*

[l] 21 E. 4, 72. 2 Inſt. 870.

Sect.

Sect. 105. For the better Explication of this Statute, ſo far as it relates to the Subject of this Treatiſe, I ſhall firſt premiſe, That [a] generally ſuch Additions in *Engliſh* are as good as in *Latin*; and where there are ſeveral Defendants of different Names and the ſame Addition, it is [b] ſafeſt to repeat the Addition after each of their Names, applying it particularly to every one of them; and where a Father hath the ſame Name and the ſame Addition with a Defendant being his Son, the Writ is [c] abateable unleſs it add the Addition of *Puiſne* to the other Additions; but where the Father is the Defendant, it is ſaid that there is no need of the Addition of *Eigne*. [d] And if the Son be *in Cuſtodia Mareſchalli*, and ſo declared againſt, it is ſaid that the Count is good without the Addition of *Puiſne*, unleſs the Father of the ſame Name and Additions be alſo in the Cuſtody of the Marſhal. And for the better underſtanding of the Nature of the ſeveral Additions required by the Statute abovementioned, I ſhall endeavour to ſhew,

[a] 1 Sid. 101. 1 Keb. 12.
[b] Bro. Additions 3.
[c] 37 H. 6. 29. pl. 10. 39 H. 6. 46. 4 Ed. 3. 31. pl. 11.
[d] Salkeld 7.

1. What is a ſufficient Addition of the Eſtate or Degree.
2. What of the Myſtery.
3. What of the Town, Hamlet, Place, or County, of the Appellee.
4. How the Defect of an Addition may be ſalved.

Sect. 106. As to the firſt Particular, *viz.* What is a ſufficient Addition of the Eſtate or Degree of the Appellee, I ſhall obſerve; First, That is neceſſary to ſhew the preſent Eſtate or Degree of the Appellee [e] at the Time of the Writ, in which Reſpect this Addition, and alſo the Addition of the Myſtery differs from that of the Place, which is ſufficiently ſet forth by naming the Appellee late of ſuch a Place.

[e] 9 Ed. 4, 2. pl. 8. 22 Ed. 4. 13. pl. 35. 21 H. 6. 3. pl. 4.

Sect. 107. Secondly, That ſuch Addition muſt be expreſſed in ſuch a Manner that it may plainly appear to refer to the Appellee; for it hath been reſolved, That to name the Appellee Son of *A.* of *B.* Butcher, is inſufficient, becauſe Butcher refers to *A.* rather than to the Appellee.

2 Inſt. 670.

Sect. 108. Thirdly, That [f] a Biſhop of an *Iriſh* Dioceſe may be as well deſcribed by the Addition of his Biſhoprick, as an *Engliſh* Biſhop may by the Addition of an *Engliſh* one; (as it ſeems to be admitted in the Year-Book of 21 *H.* 6 3. pl. 4.) But it ſeems [g] clear, That no one can be well deſcribed by the Addition of a temporal Dignity in *Ireland*, or any other Nation beſides our own, becauſe no ſuch Dignity can give a Man a higher Title here than that of Eſquire.

[f] See Theo. Lib. 6. cap. 15. Sect. 8.
[g] 2 Inſt. 667.

Sect. 109. Fourthly, That the Degree of a Serjeant [h] at Law is a good Addition, from whence it may reaſonably be argued that a Degree in either Univerſity is alſo a good Addition, as it is holden by Sir *Edward Coke* without Queſtion; yet this is made a Query by *Theloal*, [k] and it is holden in the Year-Book of 35 *H.* 6, 55, and admitted by Sir *Edward Coke* in the very Place abovecited, That a Doctor in Divinity may have the Addition of Clerk, which ſeems not eaſily reconcileable with the Opinion that the Degree of a Doctor is a good Addition; for if it were, why ſhould not the Writ be abateable for having the Addition of Clerk inſtead of it, contrary to the allowed Rule [l] in other Caſes, that the moſt worthy Addition is to be uſed?

[h] Theloal. Lib. 6. Ch. 15. Sect. 12.
[i] 2 Inſt. 668.
[k] Theloal Book 6. Ch. 15. Sect. 13.
[l] Vide ſupra Sect. 102.

Sect. 110. Fifthly, That *Generoſus* [m] or *Armiger*, [n] are either of them, good Additions for the Eſtate and Degree of a Man; *Generoſa* [o] for that of

[m] 2 Inſt. 667, 668. Bro. Addition 44. 50.
[n] 2 Inſt. 667. Bro. Addition 44. 50.
[o] 2 Inſt. 668.

a Woman; and Yeoman [a] and Labourer [b] are also good Additions for the Estate and Degree of a Man, but not for that of a Woman; and Widow [c] or Single [d] Woman, or as some [e] say, Wife of *J. S.* are all of them good Additions of the Estate and Degree of a Woman, but no such like Addition is good for the Estate and Degree of a Man. And Spinster [f] is a good Addition for the Estate and Degree of a Woman, and perhaps also for that of a Man.

Sect. 111. Sixthly, That Burgess [g] and Citizen, and Servant, [h] are all of them too general, and therefore not good Additions of the State or Degree either of Man or Woman.

Sect. 112. As to the second Particular, *viz.* What is a sufficient Addition of the Mystery of an Appellee; having first premised that the Word *Mystery* [i] includes all lawful Arts, Trades and Occupations; And [k] that if one under the Degree of a Gentleman have divers of such Arts, Trades or Occupations, he may be named by any of them, I shall endeavour to shew,

1. What Additions of this Kind are clearly good.
2. What are clearly insufficient.
3. What are questionable.

Sect. 113. And first, the following Additions of this Kind clearly seem to be good, as Husband-man, [l] Merchant, [m] Broker, [n] Taylor, [o] Point-maker, [p] Smith, [q] Miller, [r] Carpenter, [s] Cook, [t] Brewer, [u] Baker, [x] Butcher [y] Parish-Clerk, [z] Mercer [aa] Fish-Monger, [bb] Dier, [cc] School-Master, [dd] Scrivener, and such like.

Sect. 114. Secondly, The following Additions of this Kind clearly seem to be insufficient, as Maintainer, [ee] Extortioner, [ff] Thief, [gg] Vagabond, [hh] Heretick, [ii] common Informer, and such like.

Thirdly, The following Additions of this Kind seem to be questionable as,

Sect. 115. First, Farmer, which by the better [kk] Opinion seems to be an insufficient Addition, because if any Mystery be implied in the Notion of it, it is that of Husbandry, of which Husbandman is the proper Addition.

Sect. 116. Secondly, Chamberlain, Butler, and Pantler, which are holden [ll] to be insufficient Additions, because they denote only a special Kind of Officer, or Servant, and imply nothing, which in the common Understanding of the Words, comes under the Notion of a Mystery. And from this Ground it seems to follow, that neither Groom [mm] nor Page are good Additions, and yet in some [nn] of the old Books they seem to have been so admitted,

Sect. 117. Thirdly, Hosteler, which hath been holden [pp] to be a good Addition, and seems properly enough to come under the Notion of a Mystery. And tho' it hath been resolved, [qq] That any one who keeps an Inn may be sued by the Addition of a Labourer, upon the Custom of the Realm, for want of due Care of the Goods of his Guests; because whoever keeps a common Inn, is in that respect liable to answer for such Defects, by whatsoever Addition he may be styled, yet this does by no means

[a] 2 Inst. 668. Bro. Addition 3, 47, 50. [b] Bro. Addition 5. 39. [c] Fitz. Adition 5. Bro. Addition 64, 66. Theloal. Lib. 6. cap. 15. Sect. 4. [d] Fitz. Addition 5. 14 Ed. 4. 7. pl. 12. Bro. Addition 64, 66. Theloal lib. 6. cap. 15. Sect. 4. [e] 1 H. 4. 5. b. 4 H. 6. 4. pl. 9. Quære Cro. E. 198. Dy. 47. pl. 2, 3, 4. [f] Dyer 46. pl. 2, 3. 47. pl. 5. 88. pl. 107. 1 Sid. 247. [g] 2 Inst. 668. [h] 2 Inst. 668. Bro. Addition 42. 50. 55. 56. con. Bro. Addition 5. [i] 2 Inst. 668. 669. [k] Bro. Addition, 44. 2 Inst. 668. [l] Bro. Addition 44. 50. [m] Bro. Addition 40. 50. 66 [n] 9 H. 6. 65. pl. 19. Theloal. lib. 6. ca. 15. Sect. 5. [o] Bro. Addition. 15. 39. [p] 7 H. 6. 1. pl. 7. [q] 21 H. 6. 54. pl. 9. 22 H. 6. 53. a. [r] Bro. Additions 39. 51. [s] Bro. Additions 15. 22. 39. [t] 14 H. 6. 15. pl. 51. Theloal. Lib. 6. cap. 15. Sect. 6. [v] Fitz. utlagary 32. 37. 5 H. 5. 7. pl. 16 [x] 6 Ed. 4. 3. pl. 10. [y] Bro. Additions 42. [z] Bro. Additions 52, 62. [aa] 2 Inst. 668. [bb] 19 H. 6. 51. pl. 9. [cc] 5 H. 5. 7. pl. 16. [dd] 2 Leon. 186. [ee] 9 H. 6. 65. pl. 19. 2 Inst. 668. 22 Ed. 4, 1. pl. 1. 2 Inst. 668 [ff] 9 H. 6. 65. pl. 19. [gg] 22 Ed. 4. 1. pl. 2 Inst. 668 [hh] 22 Ed. 4. 1. pl. 1. [ii] 1 Roll. Rep. 190. [kk] Theloal. Lib. 6. cap. 15. Sect. 9. 2 Inst. 668. Bro. Addition 10, 28 H. 6. 4. pl. 18. [ll] Bro. Addition 50, 58. 2 Inst. 668. Theloal. Lib. 6. cap. 15. Sect. 10. [mm] 2 Inst. 668. [nn] Bro. Addition, 50, 58. Fitz. coro. 43. 21 Ed. 4. 71. [pp] Bro. Addition, 35. 21 H. 6. 50. pl. 3. [qq] 22 H. 6. 21. Theloal. lib. 6. cap. 5

Means prove such Person may not as well be sued by the Addition of Hosteler, but only that he may be sued as well under any other Addition.

As to the Third Particular, *viz.* What is a good Addition of the Town, Hamlet, Place, or County of the Appellee, I shall observe,

Sect. 117. First, That it is a good Addition of this Kind to name the Appellee late [a] of such a Town, in which respect this Addition differs from that of the Estate, Degree or Mystery. And it is said that if a Defendant be named of *A.* and late of *B.* it is sufficient to prove either Addition.

Sect. 118, Secondly, That the constant Course of Precedents hath made it a sufficient Addition of this Kind, to name the Defendant of a City which is a County [b] of it self, as *de Londino* [c] *De Norwico*, &c. without more, by which it shall be intended that he lives in the County as well as City of *London* and *Norwich*, &c. unless he shew the contrary, tho' Part of each of these Cities lie out of their Counties. However it is certain, that it is not sufficient to name a Defendant *Londini* [d] or *Bristolie*, &c. because that imports only that he belongs to such Town, and not that he resides there. Also it seems clear, [e] That it is not sufficient to name a Defendant of any Town which is not a County of it self, without shewing in what County it lies. Also if [f] a Man be named of a Parish which contains more Towns, or Hamlets, or Places known out of any Town, or Hamlet, the Defendant may plead such Matter in Abatement, because such an Addition does not pursue the Statute; but a Parish shall be intended to contain no more than one Town, unless the contrary be shewn.

Sect. 119. Thirdly, That if there be two Towns in a County of the same principal Name, with different Additions to distinguish them from one another, as *Great Dale*, and *Little Dale*, or *Upper Dale*, and *Lower Dale*, and the Defendant be named only of the principal Town without any Addition, as of *Dale* only, the Defendant may plead [g] that there are two *Dales* in the same County called *Great Dale* and *Little Dale*, and none without an Addition, *&c.* Or according to some Opinions [h] either in this Case where there are two different Towns called *Dale*, or even where there is but one Town sometimes called *Southdale*, and sometimes *Northdale*, but never simply *Dale* without an Addition, the Defendant may plead that there is no such Town as *Dale*, in the same County, because Parcel of a Name cannot be said to be the Name. But if there be two Towns of the same Name in a County without any Addition to distinguish them, as it sometimes happens where they lie at a Distance from one another, I do not find any Authority that it is not sufficient in such Case to name the Defendant generally of either of such Towns, without adding any Thing to distinguish it from the other.

Sect. 120, Fourthly, That if an Appellee live in a Hamlet of a Town, it is said [i] to be in the Election of the Appellant to name him either of the Hamlet or of the Town; but it seems that this is to be intended only of such Hamlets which are so far esteemed to be Parts of a Town, that those who live in them are in common Speech indifferently styled sometimes of the Hamlet and sometimes of the Town; for I see not how the Addition of the Town can be proper, where the Party lives in a Place known by a distinct Name, and not Parcel of it.

Sect. 121. Fifthly, That if an [k] Appellee live in a Place known by a special Name, and lying out of any Town or Hamlet, he may be well

[a] Vide supra Section 106. 21 Ed. 4. 15. pl. 1. 19 H. 6. 66. pl. 6. 1 Ed. 4 1. pl. 3. 1 Ed. 4 2. pl. 6 7. Dyer 213. pl. 44, &c. 9 H. 6. 66. pl. 6. Theloal. lib. 6. cap. 14. Sect. 17.

[b] 2 Inst. 669.

[c] 4 Ed. 4. 16. pl. 30.

[d] 21 Ed. 4. 15. pl. 1. 27 H. 6. 4 pl. 26. 35 H. 6. 12. pl. 21. 35 H 6. 12. pl. 21.

[e] Cro. Jac. 167

[f] 2 Inst. 669. vide supra Sect 92. 102. Theloal Lib. 6. cap. 14. Sect. 20. 35. H. 6. 30. pl. 37.

[g] 7 H. 6. 39. a b. 19 H. 6. 35. pl. 77. 8 H. 5. 8. pl. 8. 21 Ed. 4. 51. 10 H. 7. 4. pl. 5. 10 H. 6. 5. pl. 16.

[h] Rastal's Entries 47. a. 3 H. 6. 8. pl. 8. 14 H. 6. 23. pl. 68. Theloal. Lib. 6. cap. 14. Sect. 23. contra 7 H. 6. 45. pl. 285.

[i] Theloal. Lib. 6. cap. 14 Sect. 14.

[k] 2 Inst. 669. 35 H. 6. 30. pl. 37. 14 H. 6. 23. pl. 68. Inst. 669. 2 Inst. 669. 21 Ed. 4. 37. pl. 1. Fitz. Brief. 467. 7 H. 4. 27. a.

named of ſuch Place; but if he live in any Place known within a Town or Hamlet, it is ſaid to be ſafeſt to name him of the Town or Hamlet.

2 Inſt. 669. 3 H. 6. 31. pl. 21. 2 Theloal. Lib. 6. cap. 14. Sect. 6. 7, 9.

Sect. 122. Sixthly, That the Addition of the Place of Habitation of a Wife is ſufficiently ſhewn by ſhewing that of the Husband, becauſe it ſhall be intended that the Wife lives where the Husband does.

[a] 35 H. 6. 12. pl. 21. Bro. Error 69. Cro. Jac. 610. 2 Rol. Rep. 225. 1 Rol. A. 780. pl. 5. 2 Inſt. 670. 7 H. 6. 39. a b. ſeems contrary. [b] 1 Sid. 247. 1 Keb. 885. [c] Paſch. 3. Georgii.

Sect. 123. As to the fourth Particular, *viz*; How the Defect of an Addition may be ſalved, it hath been adjudged; [a] That if an Appellee named with an inſufficient Addition, or without any, appear and plead to the Appeal, he cannot afterwards take Advantage of the Defect of the Addition, becauſe by his Appearance and Plea he admits himſelf to be the Perſon intended. And ſome have holden, [b] That the Party by his bare Appearance ſalves the want of an Addition, or a bad one; but this ſeems contrary to almoſt all the Authorities above cited in Relation to this Matter, which ſeem to admit that the Party before other Matter pleaded may take Advantage either of the Want of an Addition or of a bad one. And accordingly it was lately [c] adjudged in an Appeal of Death between *Reeve* and *Trundal*, that the Want of an Addition of the Appellee was a good Plea in Abatement, and the Writ of Appeal was abated by ſuch Plea.

[d] S. P. C. 82. 82. Letters C. D. H. P. C. 189. Bro. brief 192. Cro. El. 695. Fitz. brief. 548. 774.

Sect. 124. As to the fourth Point abovementioned, *viz.* Where a Writ of Appeal may be abated upon the Exception or Plea of the Party for the Multiplicity of Action, it ſeems [d] clear, That after an Appellant hath appeared on a Writ of Appeal, or even on a Bill of Appeal removed into the Court of King's-Bench from before the Sheriff and Coroners by *Certiorari*, if he commence a new Appeal for the ſame Matter, the Appellee may plead in Abatement that ſuch prior Appeal is ſtill depending, *&c.* But it ſeems [e] clear, That it is no Plea in Abatement of a Writ of Appeal, that the Appellant hath brought a Bill of Appeal for the ſame Matter before the Sheriff and Coroners, becauſe ſuch Bill is not of ſo high a Nature as a Writ of Appeal, but is ſaid to be only in Nature of a Plaint till it be removed into the King's Bench, which ſeems [f] to depend on the Statute of *Magna Charta* 17, ſince which Statute the Sheriff and Coroner cannot proceed to Trial upon a Bill of Appeal, as perhaps they might have done by the Common Law. But after ſuch Bill of Appeal before the Sheriff and Coroners is removed into the King's Bench, if the Plaintiff bring a Writ of Appeal for the ſame Matter, it is holden [g] by *Staundforde*, and ſeems to be admitted in the Year Book of 4 H. 6. 14, 15, and both by *Fitzherbert* [h] and *Brook* [i] in their Abridgments of the ſaid Year-Book, that the Appellee may plead in Abatement that ſuch Bill of Appeal is depending, becauſe after it is removed into the King's-Bench, it is of as high a Nature as a Writ of Appeal. Yet Sir *Matthew Hale* [k] ſeems to be of Opinion that ſuch Bill ſo removed is not pleadable in Abatement 'till the Plaintiff hath appeared thereon; perhaps for this Reaſon, that before the Plaintiff hath appeared it doth not appear of Record that he hath proſecuted the Suit in the King's Court, becauſe the *Certiorari* might have been taken out by a Stranger. Upon which Ground it ſeems to have been reſolved [l] that it is no good Plea in Abatement of an Appeal, that the Plaintiff hath purchaſed another Writ of Appeal returnable at ſuch a Day, *&c.* and that ſuch Writ was delivered of Record to the Sheriff, becauſe it might be for what appears upon the Record, That the firſt Appeal was ſo far proſecuted by a Stranger, but in the ſame Caſe it is admitted that ſuch prior Appeal depending will abate the ſecond, where it appears on Record that the ſame Plaintiff hath appeared and ſued it, as in praying of Proceſs, *&c.*

[e] 10 H. 4. 4. pl. 13. S. P. C. 82. Letter D. Fitz. coro. 269. 465. See 4 Ed. 3. 9. pl. 21. [f] Supra, ch. 9. Sect. 39. 40. 41.

[g] S. P. C. 82. Letter D. [h] Fitz. coro. 4. [i] Bro. Appeal 44. [k] H. P. C. 189.

[l] 7 H. 7. 6. pl. 10. Fitz. Brief 192. Bro. Appeal 87. S. P. C. 82. Letter C.

Sect.

Sect. 125. As to the fifth Point, *viz.* Where a Writ of Appeal may be abated for the making of *J. S.* the Defendant, where there is no such Person, it seems clear, [a] That if there be divers Defendants in an Appeal, and one of them who does not appear be misnamed either as to the Surname, or Name of Baptism, or be described by a wrong Addition, or were dead before the Writ purchased, any of the Defendants who do appear may plead, That whereas the Appeal is sued out against *A. B.* of *C.* in the County of *D.* Yeoman, there was not at the Time of the Purchase of the Writ, nor hath been since, any such Person as *A. B. in rerum natura* as by the Writ is supposed, whereon if Issue be joined, if the Appellant cannot prove that there now is, or was at the Time when the Writ was purchased, such a Person of such Name and Addition as by the Writ are supposed, it seems that the Verdict ought to go against him, whereupon the Writ shall be abated as to all the Defendants. But it is not [b] adviseable in such a Case to plead that there was not at the Time of the Purchase of the Writ, *&c.* any such Person as *A. B.* of *C.* in the County of *D.* Yeoman, because it implies a Negative pregnant. Also if a Defendant misnamed or described by a wrong Addition do appear, it seems to be agreed [c] that no other Defendant besides himself can plead the *Misnosmer* or wrong Addition, But I do not find it to be agreed [d] That such a Plea by one Defendant shall abate the Writ as to any other besides himself; but if such Matter when pleaded by another on the Non-appearance of the Defendant, will abate the Writ as to all, it seems, difficult to give a Reason why, it should not have the like Effect when pleaded by the Party himself.

Sect. 126. As to the sixth Point, *viz.* Whether the Appellee may have more than one such Plea or Exception, there seems to be no Doubt but that if a Defendant in an Appeal, or even in an Indictment of Felony, think it proper to make use of never so many Pleas or Exceptions of this kind, requiring all of them the same kind of Trial, he may take Advantage of them all, [e] unless [f] they be repugnant to one another. Also it seems to be the better Opinion, [g] That he shall have the like Advantage, where such Pleas or Exceptions do not all of them require the same kind of Trial, but some of them are triable by Matter of Record, and others by the Country. And if such Pleas or Exceptions be all of them triable by the Country, it seems to have [h] been generally agreed, That the Defendant must at the same time plead also with them all his Matters in Bar, if he have any such, and also plead over to the Felony (unless where he hath admitted the Fact by the Matter pleaded in Bar) But if the Plea in Abatement be triable by Matter of Record, it is holden in some Books [i] that the Defendant is not bound to plead over to the Felony, till such Plea in Abatement be found against him. But [k] the greater Number of Precedents, and constant Practice of late seem to be otherwise. However it seems clear, [l] That whatsoever Matters are pleaded in Abatement of an Appeal or Indictment of Felony, and found against the Defendant, yet he may afterwards plead over to the Felony. And in these Respects such an Appeal and Indictment differ from Appeals [m] of *Mayhem* and all civil Actions whatsoever, except only Assizes of Mortdancestor [n], Novel [o] Disseisin, Nusance [p] and *Juris utrum*; [q] for it seems to be a settled Rule, That in Appeals of *Mayhem* and all other civil

[a] Dyer 348. pl. 14. H. P. C. 189. S. P. C. 82. Letter E. Rastal's Entries 49. a 52. a. Fitz. coro. 15. 43. 64. 26 H. 6. 6. pl. 6. 21 H. 7. 34. pl. 35. 7 H. 4. 27. pl. 4. [b] Bro. Appeal 111. 6 H. 7. 7. pl. 2. 21 Ed. 4. 71. 72. [c] S. P. C. 82. Letter E. See the Books above cited. [d] 21 H. 7. 31. pl. 13. 5 Ed. 4. 3. pl. 14. 7 H. 4. 27. pl. 4. S. P. C. 82. Letter E.

[e] Finch of Law, 363, 364. 385. 4 H. 6. 15. b. 16. a. Bro Appeal 44. [f] S. P. C. 82. Letter E. [g] Finch of Law 364. Quære 4 H. 6. 16. a. Bro. Appeal 44. [h] Finch of Law, 363. 364. 385. 21 Ed. 4. 71. pl. 56. Reeves and Trundal Paschæ 3 Georgii. Dy. 88. pl. 107. Rastal's Entries 49, a. b. 3 Mod. 266, pl. 3. [k] Cro. 364. 385. 27 457. pl. 628. Dy. 310. pl. 385. [p] Fitzh

[a] Quære 6 H. 7. 7. pl. 2. Shower's Reports 47. [i] Bro. Appeal 48. 66. 1 H. 6. 1. pl. 1. 27 Ass. E. 695. 10 H. 4. 4. pl. 14. 4 H. 6. 15. b. 1 H. 6. 1. pl. 1. Rastal's Entries 47. [a]. [l] Finch of Law 363, Ass. pl. 3. 1 H. 6. 1. pl. 1. [m] Cro. El. 495. pl. 14. Popham 115. Owen 59, 60. Moor N. y 36. [n] Finch of Law 385. 418. 40 Ed. 3. 29. b. 39 Ass. pl. 13. [o] 1 Ed. 3. 11. pl. 33. 82. 4 H. 6. 16. a. [q] Jon 413. S. P. C. 82. Letters E. Cro. Ca. 520. Finch of Law 363, 364. of Law 363. 385. [q] 40 Ed 3. 29. b. Finch of Law 363. 385.

Actions,

Actions, thoſe abovementioned only excepted, if a Plea in Abatement triable by the Country, [a] be found againſt the Defendant, he ſhall not be ſuffered afterwards to plead any new Matter, but final Judgment ſhall be given againſt him. Alſo it ſeems to be agreed [c] that in all other Actions, except thoſe abovementioned, if a Defendant together with a Plea in Abatement plead alſo a Plea in Bar, or the general Iſſue, he waives the Plea in Abatement; and the Plea in Bar or general Iſſue only ſhall be tried.

Sect. 127. And now I am in the third Place to conſider, What Faults of this Kind are amendable, which without ſuch Amendment would abate the Writ. It is to be obſerved, That Appeals are expreſsly excepted out of 8 *H.* 6. 12. which is the principal Statute of Amendments: alſo it ſeems [d] to be generally taken for granted, That no criminal Proſecution whatſoever is within any other Statute of Amendments, or any of the Statutes of *Jeofailes*; from whence it follows that no Defect is amendable in an Appeal, but ſuch only as is amendable by the Common Law. And therefore it ſeems to be the better Opinion, That no falſe [e] *Latin* in a Writ or Bill of Appeal, nor Omiſſion of a Word, [f] nor even of a Letter [f not other Defect or Variance [h] from the proper legal Form, can be amended, becauſe no ſuch Fault is amendable by the Common Law, without the Conſent [i] of the Parties, except only in Actions wherein the King [k] is a Party. It ſeems indeed to be generally holden in ſome Books, [l] That ſuch Faults in a Writ are amendable where the *Curſitor* varies from his Inſtructions, in the Names [m] or Additions of the Parties, or other like Matters which he muſt take from his Inſtructions. But what is ſaid in ſuch Books in relation to this Matter ſeems to be intended of ſuch Writs only as are within the Purview of the Statutes of Amendments, and therefore cannot be applied to Appeals; yet it ſeems that a Miſpriſion in the Count is amendable by the Common Law, as well in an Appeal as in any other Action, before it is entered on the Record; and ſo it ſeems that the Year [n] Book of 7 *H.* 4. 27. is to be intended, in which a Miſtake in the Declaration in laying the Fact in an improper Viſne, was ſuffered to be amended. Alſo it ſeems that after the Count is entred on the Record, a Variance in it from the Writ, if a meer Miſpriſion, may be amended by it, as it ſeemed to be agreed in an Appeal of Death between *Smith* and *Bowen*, [o] wherein the Word *Murdum* in the Count on the Record was adjudged to be amendable by the Word *Murdrum* in the Bill on the File.

As to the Fifth general Point, *viz.* What may be pleaded in Bar of an Appeal, having already in the former Part [p] of this Chapter endeavour'd to ſhew what may be pleaded in Bar of an Appeal of *Mayhem*, and intending in the later Part of the Book to conſider the Learning relating to Pleas in Bar of criminal Proſecutions in general, I ſhall in this Place only examine the Nature of Pleas in Bar of Appeals of Felony in particular, and for that Purpoſe having premiſed that by the better Opinion [q] at this Day, no ſpecial Plea in Juſtification of the killing ſhall be admitted in an Appeal of Death, but that in every ſuch Caſe the general Iſſue is to be pleaded, I ſhall conſider.

1. What Pleas will be good Bars of an Appeal of Felony by ſhewing that the Plaintiff had never any Right to bring it.

2. Whether a *Retraxit* or Nonſuit in a former Appeal of this kind will be good Bars of another.

3. Whether a Diſcontinuance.

4. Whe

[a] Vide Cro. El. 203. pl. 34. Dyer 228 pl. 45. Yelv. 36. [b] 1 Sid. 252. pl. 22. 1 Lev. 163. 1 Inſt. 33. Yelv. 112. Aleyn 65, 66. [c] Cro. El. 495. Owen 59. Noy 36. Moor 457. Popham 115. Vide Thelo. Lib. 15. cap. 5. [d] Vide Sal. keld 51. 1 Bulſt. 142. 144. [e] 9 H. 7. 16. pl. 8. 1 Bulſt. 142. 144. 4 H. 6. 16. pl. 16. Bro. Amend. 62. [f] Fitz. Coro. 121. 13 Aſs. pl. 10. [g] Fitz. Amendment 68. [h] Fitz. Variance 59. 8 Co. 156. b. 4 H. 6. 16. pl. 16. [i] Fitz. Amendments 63. [k] 8 Co. 156. b. 4 H. 6. 16. pl. 16. 40 Aſs. pl. 26. [l] Mo. 866. pl. 1196. 1 Rol. 138. pl. 13. Cro. El. 644. pl. 49. Quære Hob. 128. [m] 2 Ventris 46. 49. 130. 152. 1 Sid. 412. pl. 8. Hob. 118. Hutton 56, 57. Cro Car. 74. Littleton's Rep. 50. [n] Fitz. Coro. 80. [o] Mich. 7. Annæ. [p] Sect. 22, 23, 24, 25, 26. [q] See B. 1 Chap. 28. S. 3.

4. Whether an Abatement of a former Appeal.

5. Where the bringing of an Appeal of this Kind againſt one Perſon ſhall be a Bar of any ſubſequent Appeal againſt any other Perſon not named in the firſt.

6. Where a Releaſe will be a good Bar of an Appeal of this Kind.

7. Where the Appellant may be barred as to one Appellee, and continue his Suit againſt the reſt.

8. Whether any, and which of theſe Pleas, are conſiſtent with the general Iſſue.

Sect. 128. As to the firſt Particular, *viz.* What Pleas will be good Bars of ſuch an Appeal by ſhewing that the Plaintiff had never any Right to bring it, it ſeems to be a good general [a] Rule, That any Plea of this Kind is good which ſhews that the Plaintiff wants any of thoſe Requiſites which the Law makes neceſſary to entitle him to the Appeal. And therefore in an Appeal of Death by a Woman it is a good Plea, that [b] ſhe was never lawfully married to the Deceaſed; or [c] that ſhe hath not continued a Widow ſince his Death, but hath taken another Huſband. Alſo in an Appeal of Death by one as Heir, it is a good Plea, that *A. B.* at the time [d] of the Writ was and ſtill is Heir of the Deceaſed; or [e] that one of the Defendants was the Wife of the Deceaſed, and made a Defendant by Covin to exclude her from her Appeal; or that the Plaintiff is a Baſtard [f] and not legitimate. And where one brings an Appeal as Brother and Heir, it is a good Plea, That he is not [g] Brother and Heir as by his Writ and Declaration he hath ſuppoſed, or [h] that he hath an Elder Brother by the ſame Father and Mother ſtill alive; or where one brings an Appeal as Couſin and Heir, *viz.* Brother of *A. B.* Father of the deceaſed, it is a good Plea, That he is not Couſin [i] and Heir, *viz.* Brother of *A. B.* Father of the deceaſed, *&c*, as by his Writ and Declaration he hath ſuppoſed. Alſo [k] it is a good Plea in any Appeal of Death, That the Plaintiff hath ſlipt his Time in not bringing the Appeal within the Year and Day after the Death of the Perſon ſuppoſed to have been killed. Alſo it is a good [l] Plea in an Appeal of Robbery, That the Plaintiff is a Villain to the Defendant. And it is a good [m] Plea in an Appeal of Rape by a Man and a Woman, That the Plaintiffs were never lawfully married. And [n] it is a good Plea in Bar of any Appeal of Felony, That the Plaintiff is an Ideot, or that he was born deaf and dumb. Alſo it is ſaid by Sir *William Staundforde*, [o] That it is a good Plea in Bar of any ſuch Apeal, That the Plaintiff is attainted of Treaſon or Felony; however [p] it ſeems that ſuch Attainder is no perpetual Bar, but only during the Time it continues in Force.

Sect. 129. As to the ſecond Particular, *viz.* Where a *Retraxit* or Nonſuit in a former Appeal of this Kind will be good Bars of another; I take it to be clear, [q] That a *Retraxit* of any ſuch Appeal is a Bar of all ſubſequent Appeals of the ſame Kind; for it ſeems to be a general ſettled Rule, That a *Retraxit* of any Action whatſoever is a Bar of all others of the like or inferior Nature. Alſo it ſeems to be certain, That a Nonſuit on a Bill [r] of Appeal, whether commenced in the Court of King's Bench, or before Juſtices [s] of Gaol-Delivery, or before the Sheriff [t] and Coroners, or a Nonſuit after [u] Declaration on a Writ of Appeal, is a Bar of all other Appeals of the ſame Kind; becauſe no ſuch Bill or Declaration ſhall be received, unleſs [x] the Appellant have firſt appeared in proper Perſon; and it ſeems to be agreed by all the Books, That a Non-

[a] S. P. C. 98. H. P. C. 190.
[b] Supra Sect. 36. S. P. C. 98.
[c] Supra Sect. 38. S. P. C. 98.
[d] Raſtal's Entries 50 pl. 8.
[e] Raſtal's Entries 50 pl. 9.
[f] Raſtal's Entries 49. a.
[g] Raſtal's Entries 49. a. b.
[h] Supra Section 40. Letter i.
[i] Raſtal's Entries 49. a.
[k] S. P. C. 98.
[l] Supra Sect. 44. Letter h. S. P. C. 98.
[m] Supra Section 62. S. P. C. 98. Letter b.
[n] Supra Section 32. S. P. C. 98. Letter c.
[o] S P C. 98. Letter c
[p] Supra Sect. 32.
[q] 1 Inſt. 138. b. 139. a. H. P. C. 190. 8 Co. 58. 62.
[r] S. P. C. 148. Letters a. b.
[s] 10 H. 4. 4. pl. 14.
[t] S. P. C. 148. Letters a. b. 22 Aſs. pl. 97.
[u] H. P. C. 190. S. P. C. 148. Letters a. b. Cro. El. 605.
[x] Salkeld 64. Vide f. n. b. 26. Letter p.

ſuit after ſuch an Appearance is peremptory. Alſo it is holden generally in ſome Books, [a] That a Nonſuit after Appearance is a peremptory Bar to the Appellant, without adding that he muſt alſo have declared; from whence, and alſo from the general Reaſon of the Thing, it may be reaſonably argued, That if it any way appear on Record that the Appellant who was nonſuited in a former Appeal, did actually appear and proſecute ſuch Appeal, as by praying [b] of Proceſs on it, *&c.* he ſhall be barred in any other Appeal of the ſame Kind. But it ſeems [c] that the bare taking out of a Writ of Appeal, and cauſing it to be delivered of Record to the Sheriff, and a Nonſuit upon it, is no Bar of a ſecond Appeal, becauſe it doth not appear of Record, but that it might be done by a Stranger; and notwithſtanding ſome Books [d] ſeem to hold generally, that any Nonſuit in Appeal is peremptory, yet it ſeems to be in great Meaſure ſettled [e] at this Day, that ſuch Nonſuit ought to be after an Appearance in proper Perſon of Record.

[a] 22 Aſs. pl. 97. 47 Ed. 3. 16. pl. 27. Bro. Appeal 28. 71. Fitz. coro. 184. 1 Inſt. 139. a.
[b] Vide 4 H. 6. 16 a. Supra Sect. 26.
[c] 9 H. 4. 2. b. 3. a. 47 Aſs. pl. 7.
[d] Vide 7 H. 7. 6. pl. 10.
[e] S. P. C. 148. Letter a. 7 H. 7. 6. pl. 10. 1 Sid. 32.

Sect. 130. As to the third Particular, *viz.* Whether a Diſcontinuance of a former Appeal of this Kind will be a good Bar of another, it is holden [f] by the Reporter of the Year-Book of 16 *Ed.* 4. That a Diſcontinuance of one Appeal is a Bar of any other, becauſe the Life of the Appellee was once put in Jeopardy by the firſt Appeal; but this Reaſon proves as ſtrongly that the Abatement of an Appeal where the Writ was good ſhall be a Bar of another; for by an Appeal ſo abated the Life of the Appellee is as much put in Jeopardy as by an Appeal that is diſcontinued; and yet it ſeems to be agreed at this Day, That ſuch an Abatement of an Appeal cannot regularly be a Bar of another, as ſhall be more fully ſhewn in the next Section. Nor can I find it any where adjudged, That the Diſcontinuance of one Appeal is a Bar of another. It is true indeed, that in *Bradley* [g] and *Banks*'s Caſe, the Appellee was totally diſcharged upon a Diſcontinuance. But the Reaſon hereof ſeems to have been, not that the Diſcontinuance would be of it ſelf a Bar to any other Appeal, but becauſe the Year and Day were paſſed, and conſequently there could be no other Appeal, and the Appellee had alſo been before convicted on an Indictment, and had his Clergy, and conſequently could not be proceeded againſt at the Suit of the King. However, Granting the Opinion aforementioned to be Law, that the Diſcontinuance of one Appeal ſhall be a good Bar of any other; ſurely it is to be intended of ſuch a Diſcontinuance only, as happens after the Appearance of the Appellant, for the Reaſons given in the precedent Section, in relation to a Nonſuit.

[f] 16 Ed. 4. 11. pl. 7. Bro. Appeal 103. Vide S. P. C. 59. G.
[g] 1 Bulſt. 141. Cro. Jac. 283, 284. Yelv. 204.

Sect. 131. As to the fourth Particular, *viz.* Whether an Abatement of a former Appeal of this Kind will be a good Bar of another, it ſeems clear, That if an Appeal by a Wife abate by her taking another Husband, or an Appeal by an Heir abate by his Death, there can be no [h] other Appeal. But the Reaſon hereof ſeems not ſo much to depend on the Abatement, as on the Marriage in the firſt Caſe, and the Death in the ſecond, which, as it ſeems the better [i] Opinion, would of themſelves have abated a ſubſequent Appeal, whether any had been brought before or not. Yet I find it holden generally in ſome [k] of the Old Books, that an Appeal once determined, cannot revive; and in [l] others, that where an Appeal of Maihem, which in this Reſpect ſeems not to differ from other Appeals, is abated without the Default of the Party, he may have a new one, by which it ſeems to be implied, that if it abated by his Default he cannot have a new one; and this Opinion ſeems alſo to be confirmed by ſome other

[h] Vide S. P. C. 147. Letter c. H. P. C. 200.
[i] Vide ſupra Sect. 38, 39, 41.
[k] 6 H. 4. 6. pl. 29. Bro. Appeal 10.
[l] 50 Ed. 3. 1. pl. 2. Bro. Appeal 16.

other [a] Old Books, but it is denied [b] by others. However, I take it to be ſettled [c] at this Day, That where there continues to be a Plaintiff, not diſabled to proſecute, he ſhall not be barred in a ſecond Appeal by an Abatement of the firſt.

[a] 9 H. 5. 1. pl 3. Bro. Appeal 38 44. 4 H. 6. 16. a.
[b] Bro. Appeal 53. 118, 146. 13 Aſs. pl. 10.
[c] Vide ſupra Sect. 4

Sect. 132. As to the fifth Particular, *viz.* Where the bringing of an Appeal of this Kind, againſt one Perſon will be a Bar of any ſubſequent Appeal againſt any other Perſon not named in the firſt; it is ſaid, [d] That anciently one might have had two Appeals for the ſame Fact, one againſt the Principal, the other againſt the Acceſſary. And even at this Day, if one be robbed of the ſame [e] Goods, at ſeveral times, or receive different [f] Maims, whether at the ſame or at ſeveral times; or a Woman be raviſh'd more than once, whether by the ſame or by different Perſons, it ſeems clear that ſeveral Appeals lie for each diſtinct Offence. But it ſeems to be generally [g] agreed at this Day, That after one hath brought an Appeal of Felony againſt one Perſon, who is thereon attainted and hanged; he may be barred by it in any ſubſequent Appeal, for the very ſame Crime, againſt any other Perſon not named in the firſt; whether ſuch ſubſequent Appeal, againſt the Perſon ſo omitted in the firſt, be brought againſt him as Principal, or as Acceſſary [h] before the Fact, or even as Acceſſary after the Fact, unleſs where he happens to be ſo Acceſſary after the firſt Appeal was commenced; in which Caſe it is certain that he is liable to ſuch ſecond [i] Appeal, becauſe it was impoſſible to charge him in the firſt. But otherwiſe, after an Attainder had on the firſt Appeal, the Law ſeems to diſallow the bringing of a ſecond; for this Reaſon, That where an Appellant has ſo far had his Revenge in one Appeal, he ſhall not be indulged in the bringing of another, which his own Laches only made neceſſary. Alſo it ſeems to be [k] clear, That if one bring an Appeal of Felony againſt another, who is either acquitted by Verdict, or otherwiſe finally diſcharged by any other Matter, which will peremptorily bar any other Appeal againſt him by the ſame Appellant, for the ſame Fact, the Appellant may alſo be barred in any other Appeal for the ſame Fact, againſt any other Perſon whatſoever; perhaps for this Reaſon, That he who appears to have brought an ill-grounded Action of ſo high a Nature, or to have ſo far made Default in the Proſecution of ſuch an Action as to be for ever barred from bringing another againſt the ſame Defendant, ſhall not be thought worthy to bring another againſt any other Perſon whatſoever. But I cannot be ſatisfied with the Reaſon which ſome of the Books ſeem to give why all the Defendants muſt be named in one Appeal; which is this, That the Statute of *Magna Charta* 34, by which is provided, *That none ſhall be impriſoned upon the Appeal of a Woman, for the Death of any other than her own Husband*, ſpeaks only of Appeal in the ſingular Number, from whence it is ſaid to be collected, that all the Defendants muſt be named in one Appeal. But by what kind of Argument this Collection is made, I do not find, nor do I ſee why twenty Appeals brought by the ſame Woman, if the Law would permit ſo many, are not as much within the Letter and Meaning of the Statute as one Appeal. And where the Law does permit the bringing of a ſecond Appeal againſt the ſame Perſon, as it is clear that in ſome Caſes it does, it may reaſonably be argued, That he may as well bring it againſt others alſo; As [g] where the firſt is abated, and there ſtill continues to be a Plaintiff, not diſabled to proſecute, [n] and in ſome other Caſes: For if an Appellant be not barred by the Abatement of his firſt Appeal, from bringing a ſecond againſt thoſe who had Vexation by the firſt, and were legally diſcharged from it, why ſhould he be barred by it, as to thoſe who were not concerned in it?

[d] S. P. C. 65. Letter C.
[e] S. P. C. 65. Letter d.
[f] 9 H. 4. 2. a. 11 H. 4. 14. a. Bro. Appeal 28.
[g] Bro. Appeal 32. 11 H. 4. 13. b. 14. a.
[h] H. P. C. 190. S. P. C. 65. Letters 98. Letter C. Bro. Appeal 14, 28. 4 Co. 47. b. Vide ſupra Ch. 6 Sect 5.
[i] Keilw. 83. a. ſeems contrary as to Appeals of Robbery.
[k] 28 Ed. 3. 90. pl. 138. 26 Aſs. pl. 42. Keilw. 83. a. 4 Co 44. b. 48. a. 1 47 Ed. 3. 16. pl. 27. Fitz. 1 Cro. 104. 9 H. 4. 2. a. H. P. C 188, 190. 190 S. P. C. 98. Letter c. 47 Aſs pl. 7.
[m] 28 Ed. 3. 90. pl 138. 4 Co. 48.
[n] See the precedent Section.

Sect.

Sect. 133. As to the ſixth Particular, *viz.* Where a Releaſe will be a good Bar of an Appeal of this Kind, it ſeems clear, That a Releaſe of all manner of Actions, or of all Actions [a] Criminal, or of all Actions [b] Mortal, or of all Actions concerning *Pleas of the Crown*, or of all [c] Appeals, or of all [d] Demands, will be a good Bar of any ſuch Appeal. But it [e] ſeems that a Releaſe of all Actions Perſonal will not bar ſuch an Appeal, becauſe that an Appeal in which the Appellee is to have Judgment of Death, is higher than an Action Perſonal, and not properly called an Action Perſonal. Alſo it ſeems [f] clear, That whatſoever the Nature of the Releaſe may be, it ſhall not wholly diſcharge the Appeal, unleſs it were made before it was commenced; for if it be ſubſequent to the Appeal, it ſhall only diſcharge it as to the Suit of the Plaintiff, and after Judgment given for ſuch Diſcharge, he ſhall be arraigned on the Appeal at the King's Suit, as ſhall be ſhewn more at large in the Chapter of Indictments. Alſo it is [g] certain, That no Releaſe ſhall diſcharge a Perſon attainted, without the King's Pardon.

Sect. 134. As to the ſeventh Particular, *viz.* Where the Appellant may be barred as to one Appellee, and continue his Suit againſt the reſt, it [h] ſeems, That if he be barred by a Releaſe given, or *Retraxit* entred as to one, or by being vanquiſhed in Battel by one, yet he may continue his Suit againſt the reſt, becauſe he is to have a ſeveral Execution againſt every one of them. Yet in an Appeal againſt divers, whether they plead the ſame or ſeveral Iſſues, it hath been adjudged, [i] That a Nonſuit againſt one, at the Trial of any one of the Iſſues, is a Nonſuit as to all, of which this ſeems to be the beſt Reaſon, That [k] ſuch a Nonſuit operates in Nature as a Releaſe of the whole. But whether [l] the Diſcontinuance of an Appeal, as to one Appellee, ſhall have the like Conſtruction as to all, may deſerve to be conſidered.

Sect. 135. As to the eighth Particular, *viz.* Whether any, and which of the Pleas abovementioned are conſiſtent with the general Iſſue, it ſeems agreed at this Day, That if the Defendant in an Appeal of Death, by a [m] Wife, plead *Nunques accouple in loial Matrimony*, [n] or in an Appeal of Death, by one as Heir, plead that the Appellant is a Baſtard, [o] or that he hath an elder Brother of the whole Blood alive, or in [p] any Appeal of Death plead that the Perſon ſuppoſed to have been killed, was dead above a Year before the Purchaſe of the Writ, or that [q] the Appellant hath formerly brought an Appeal for the ſame Fact againſt another Perſon, who was thereon attainted and hanged, or generally [r] any other Plea, not amounting to an implied Confeſſion of the Fact, as a Releaſe, *&c.* Whether it be triable by Matter [s] of Record, or by *Pais*; and whether it [t] deny that the Appellant had ever any Right to the Appeal, or admit that he once had a Right, but ſhew that he is now barred; he may, together, with ſuch Plea in Bar, plead alſo Not guilty to the Felony. And if ſuch Plea be triable by the Common Law, unleſs the Appellant reply both to that, and alſo to the Plea of Not guilty, he diſcontinues the Appeal; but [u] if it be not triable by the Common Law, the Defendant needs only to reply to it, and not to the Felony, till after ſuch Plea has been tried. But it is holden in many Books [x] of good Authority, That a Man ſhall not be admitted to plead a Releaſe, and the general Iſſue alſo, becauſe it is repugnant at the ſame time to inſiſt that the Crime is re-

[a] Littleton Sections 500, 501.
[b] 1 Inſt. 287. b. 288. a.
[c] Littleton Section 501.
[d] Littleton Section 508.
[e] Littleton Section 500, 501. Contra Fitz. Releaſe 46. Quære Bro. Appeal 29. 21 Ed. 4. 72. 9 H. 4. 2. pl. 8. Vide ſupra Section 25.
[f] Fitz. coro. 12. S. P. C. 148. Letter B. H. P. C. 200. Raſtal's Entry 43. pl. 8. 48. a.
[g] Supra. Sect. 38, 42.
[h] H. P. C. 190. 21 Ed. 4. 72. a. b. 2 R 3. 9. pl. 18. Bro. Appeal 111, 120.
[i] Cro. El. 460. pl. 6. Dyer 120. pl. 11. 7 H. 6. 27. pl. 19. 27 Ed. 3. 87. pl. 45. 2 Roll's Ab. 133 Letter H. 1 Inſt. 139. 1 Sid. 378. pl. 7 Bro. Diſcontinuance *de proceſs* .o.
[k] Hob. 180.
[l] Vide 7 H. 6. 27. pl. 19. 30 Aſs. pl. 36. 39 Ed. 3. 3. a. 38 Aſs. pl. 17. 27 Ed. 3. 87. pl. 45.
[m] 3 Leon. 268. Cro. El 223.
[n] 7 Ed. 4. 15. pl. 3. Quære 14 Ed. 4. 7. pl. 10.
[o] Raſtal's Entries 49. pl. 5. 7 Ed. 4. 15. pl. 3. Quære 14 Ed. 4. 7. pl. 10.
[p] 21 H. 6. 29. a. [p] 22 Ed. 4. 39. b.
[q] 9 H. 4. 2. pl. 7. [r] 21 H. 6. 29 a. 22 Ed. 4. 39. b. 40. Raſtal's Entries 49. pl. 6. 7. 50. pl. 8. 583. b. 584. S. P. C. 98. Letter D. Keil. 188, 189.
[s] 21 H. 6. 28, 29. 4 H. 7. 5. pl. 1. 9 H. 4. 2. pl. 7. 35 H. 6. 57. pl. 2. 8 Ed. 4. 3. pl. 6. Con. Bro. Apeal 14. 48. 4 H. 7. 5. b. 6. a
[t] 7 Ed. 4. 14 pl. 3. 21 H. 6. 29. a.
[u] Cro. El. 223. 3 Leon. 268.
[x] S. P. C. 68. Letter D. Finch 385, 386. H. P. C. 190, 191. Hob. 170, 171.

leaſed,

leaſed, and [a] yet that there was no ſuch Crime committed to be releaſed. But I do not find this Point any where adjudged; and as to the Argument abovementioned, from the Repugnancy of the Plea of a Releaſe, to the general Iſſue, it may be anſwered, That a Man may reaſonably take a Releaſe to free himſelf from Trouble, from the Suſpicion of a Crime, of which he would by no means own himſelf guilty; and in Appeals of Death after a Plea of [b] *Autrefoits convict* by Verdict, and even after the Plea of [c] *Autrefoits convict* by Confeſſion, and Clergy thereon had, the general Iſſue has been received; and yet ſuch Pleas as much imply a Confeſſion of the Fact, as the Plea of a Releaſe. And in *Smith*'s Caſe, who was indicted of High Treaſon in the beginning of his preſent Majeſty's Reign, for the Murder of Colonel *Parks*, after a Plea of a Pardon, the general Iſſue was received. However, I do not find it any where holden, That the Plea of a Releaſe may not be pleaded, if the Defendant think fit, without Pleading the general Iſſue. Alſo it ſeems queſtionable, [d] Whether any other Plea in Bar, whether triable by Matter of Record, or by *Pais*, may not alſo be received without Pleading the general Iſſue, as it ſeems clear, That in ſome Caſes it may, [e] as where it declines the Juriſdiction of the Court, [f] or would be prejudicial to the Defendant by infranchiſing the Plaintiff, as where a Villain brings an Appeal of Robbery againſt his Lord, who pleads the Villenage in Bar, in which Caſe he ſhall not be compelled to plead Not guilty, becauſe that would amount to an Infranchiſement of the Plaintiff; by ſuppoſing that the Fact, if committed, needs a Defence, which it cannot do unleſs the Plaintiff have a Property, which if he be a Villain, he cannot have againſt his Lord. Alſo, It ſeems clear, That [g] if any of the Bars abovementionted, except that of a Releaſe, be ſuffered to be pleaded without the general Iſſue, and be found againſt the Defendant, they do not conclude him from pleading the general Iſſue afterwards; and as to the Plea of a Releaſe, whether that being pleaded without the general Iſſue, and found againſt the Defendant, do conclude him at this Day to plead the general Iſſue afterwards, may deſerve to be conſidered for the Reaſons above mentioned. [h] But it ſeems, That if a Demurrer to the Court be adjudged againſt an Appellee, he ſhall not be admitted to plead either in Bar, or the general Iſſue, but ſhall be condemned, as ſhall be ſhewn more at large in the Chapter of Demurrers.

[a] Hob. 270, 271.
[b] 1 Bulſt. 141. Yelv. 204. Cro. Jac. 283.
[c] 4. Co. 45.
[d] 1 And. 68. Finch 385. S. P. C. 151. Letter A. 22 Ed. 4. 39. b. 40. Shower's Reports 47.
[e] Widdrington and Charlton, Trin. 11. Annæ.
[f] 50 Ed. 3. 15. 28 Ed. 3. 91. pl. 4. 27 Aſs. pl. 41. 35 H. 6. 57. pl. 2. 8 Ed. 4. 3. pl. 6.
[g] Keilw. 175. pl. 10. 91. pl. 1. 186. pl. 3. Raſtal's Entries 54. a. 18 Ed. 3. 32. pl. 4. H. P. C. 191. S. P. C. 98. Letter D.
[h] Vide Littleton, Section 192, 193, 194, 208. 14 Ed. 4. 7. pl. 10. 50 Ed. 3. 15, 16. a. 28 Ed. 91. pl. 4. S. P. C. 98. Letter D. Fitz. Coro. 429. 27 Aſs. pl. 3. Contra 7 Ed. 4. 15 pl. 3. Keilw. 100. H. P. C. 190, 191. Finch 385, 386. H. P. C. 243. Sect. 2 and 3.

Sect. 136. As to the ſixth general Point, *viz.* Where the Appellant ſhall render Damages to the Appellee for a falſe Appeal, having premiſed that by the Common Law a Defendant may [i] recover Damages for a falſe and malicious Appeal, againſt the Appellant and his Abettors, by a Writ of Conſpiracy, or an Action on the Caſe, in the Nature of ſuch Writ, as hath been more fully ſhewn in Book 1. [k] I ſhall here endeavour to ſhew in what Caſes, and in what Manner, he may, if he chuſe rather ſo to proceed, recover ſuch Damages by the Statute of *Weſtminſter* 2. 12. which was made for his ſpeedier Remedy, and is enacted as followeth,

Sect. 137. *Foraſmuch as many through Malice intending to grieve others, do procure falſe Appeals to be made, of Homicides and other Felonies, by Appellors, having nothing to ſatisfie the King for their falſe Appeal, nor to the Parties appealed for their Damages: It is ordained, That when any being appealed of Felony, ſurmiſed upon him, doth acquit himſelf in the King's Court in due Manner, either at the Suit of the Appellor, or of our Lord the King, the Juſtices be-*

[i] 14 Ed. 4. 7. pl. 10. Keilw. 100. [i] Inſt. 283. Keilw. 27. a. S. P. C. 167. b. [k] Book 1. Sect. 2 and 3.

fore whom the Appeal ſhall be heard and determined, ſhall puniſh the Appellor, by a Tear's Impriſonment; and the Appellor ſhall nevertheleſs reſtore to the Parties appealed their Damages, according to the Diſcretion of the Juſtices, having Reſpect to the Impriſonment or Arreſtment, that the Party appealed hath ſuſtained by Reaſon of ſuch Appeals, and to the Infamy that they have incurred by the Impriſonment, or otherwiſe; and ſhall nevertheleſs make a grievous Fine unto the King. And if peradventure ſuch Appellor be not able to recompence the Damages, it ſhall be inquired by whoſe Abetment, by Malice, the Appeal was commenced, if the Party applealed deſire it. And if it be found by the ſame Inqueſt, that any Man is Abettor through Malice, he ſhall be diſtrained by a judicial Writ at the Suit of the Party appealed to come before the Juſtices. And if he be lawfully convict of ſuch malicious Abetment, he ſhall be puniſhed by Impriſonment and Reſtitution of Damages, as before is ſaid of the Appellor.

And for the better underſtanding this Statute, I ſhall endeavour to ſhew how the ſeveral Parts of it have been expounded.

Sect. 138. And firſt, Whereas the Words of the Preamble are, *That many through Malice procure falſe Appeals to be made by Appellors, having nothing*, &c. And in the Purview it is ſaid, *That it ſhall be inquired by whoſe Abetment, by Malice, the Appeal was commenced*, &c. *And if it be found that any Man is an Abettor, through Malice*, &c. In all which Places the Malice is expreſly referred to the Procurers and Abettors only, and in no part of the Statute to the Appellant, it is holden by [a] ſome, That where-ever an Appellee is acquitted of an Appeal of Felony, he ſhall recover Damages by Force of this Statute againſt the Appellant, except only where he hath been indicted of the ſame Felony before. And it muſt be confeſſed, That in the [b] Reports and Entries [c] relating to this Matter, Damages ſeem generally of Courſe to have been awarded againſt the Appellant, on the Acquittal of the Appellee in all other Caſes, without any finding that the Appeal was malicious. Yet it is holden by [d] others, That the Appellant is no more within the Intent of the Statute, than his Abettors, unleſs his Appeal were grounded on Malice. And if it be conſidered, That where the Appellant is to render Damages by Force of the Statute, he is alſo, by the expreſs Words of it, to have a Year's Impriſonment, and to be grievouſly ranſomed to the King; ſurely it cannot be imagined that the Makers of the Statute intended in any Caſe to expoſe him to ſo ſevere a Puniſhment, for a legal Proſecution, which he has reaſonable Evidence to induce him to commence, though it may not be ſufficient to induce a Jury to convict the Defendant. Neither do I ſee any Reaſon why the bringing an Appeal againſt one who hath been before indicted, by a ſufficient Indictment [e] of the very ſame [f] Crime, which is agreed [g] not to be within the Meaning of the Statute, ſhould be the only excepted Caſe; eſpecially conſidering that any other Caſe, wherein the Appellant plainly appears to proceed on a probable Ground of Suſpicion, is within the Reaſon given in many Books [h] for the the Favour ſhewn to the Appellant, where the Appellee has been indicted before; which is this, that the Appellant had Cauſe and Evidence to purſue the Appeal, and it appears to the Court that it was not merely founded on Malice. And this is alſo one of the Reaſons given in the [i] Books, why the Appellant is not to render Damages, by the Intent of the Statute, where the Appellee in an Appeal of Murder is found guilty of Homicide, *ſe defendendo* only. And as to the general Expreſſions of the

[a] 1 Inſt. 139. b. 2 Inſt. 384. Vide Littleton, Section 208. 22 Aſs. pl. 39. 26 H. 8. 3. pl. 14.
[b] See the Books cited under this and the following Sections.
[c] Raſtal's Entries, 56. pl. 2.
[d] S. P. C. 168. Letter B. See L. Quinto, Ed. 4. 126 a. 40 Ed. 3. 42. pl 24.
[e] 20 Ed. 4. 6. pl. 5. 2 Inſt. 384.
[f] 26 H. 8. 3. pl. 14. 33 H. 6. 1. pl. 6. 40 Ed. 3. 42. 24. 14 H. 7. 2. pl. 8. 40 Aſs. pl. 18.
[g] 22 Aſs. pl. 39. 26 H. 8. 3. pl. 14. 33 H. 6. 1. pl. 6. 40 Ed. 3. 42. pl. 24. 14 H. 7. 2. pl. 8. 20 Ed. 6 pl. 5. 40 Aſs. pl. 18. Fitz. Damages 67.
[h] 40 Ed. 3. 42. pl. 24. 14 H. 7. 2. pl. 8.
[i] 21 Aſs. pl. 77. 2 Inſt. 384.

the Books abovementioned, in which Damages ſeem of Courſe to be awarded againſt the Appellant, without any Inquiry whether his Appeal were Malicious or not; it may be anſwered, That the Books ſpeak as generally in Relation to the Recovery of the Damages againſt the Abettors; and yet it ſeems [a] plain from the whole Purport of the Statute, That they are not within the Purview of it, unleſs their Abetment were founded on Malice. And ſome [b] ſeem to have gone ſo far as to hold, That the Heir who abets his Mother in bringing an Appeal for the Death of his Father, can be in no Caſe within the Statute, by Reaſon of ſuch Abetment; becauſe Nature and Duty oblige him, in ſuch a Caſe, to abet his Mother. But this Reaſoning, if ſtrictly examined, ſeems to prove no more than this, That in ſuch a Caſe the Heir ſhall *prima facie* be intended to have abetted the Appellant, rather out of Duty than Malice, and that therefore he ſhall not be taken to be within the Purview of the Statute, without very ſtrong Evidence of his Malice. But ſurely it cannot be denied, That in ſome Caſes it may be notorious, That an Heir abets ſuch an Appeal, not out of Duty but Malice; as where he himſelf, without the leaſt probable ground of Suſpicion, is the firſt Promoter of the Proſecution; or where he cauſes it to be carried on by violent and unfair Methods, not for the Sake of Juſtice but Oppreſſion, in which Caſes it ſeems harſh to ſay, That he is not as well within the Meaning as Letter of the Statute.

[a] 2 Inſt. 384. S. P. C. 168. Letter B. P. C. Com. 88 b. *ſeems contrary.* Vide Dy. 120 pl. 10.

[b] Fitz. Champert 7 10. P. C. Com. 88. b. 2 Inſt. 384.

Sect. 139 Secondly, In the Conſtruction of the Words *Homicides and other Felonies*, in the Preamble of the Statute, it hath [c] been adjudged That the Purview of it extends to Rape, which was made a Felony by another [d] Branch of the ſame Statute; and it is [e] holden, both by *Coke* and *Staundforde*, That, it in like manner extends to Offences made Felonies by any ſubſequent Statute.

[c] Fitz. Coro. 275. 381. P. C. com. 124. b.

[d] Supra Sect. 59, 60.

[e] 2 Inſt. 384. S. P. C. 198. Letter D.

Sect. 140. Thirdly, In the Conſtruction of theſe Words, *When any being appealed of Felony ſurmiſed upon him, doth acquit himſelf in the King's Court in due Manner, either at the Suit of the Appellor, or of our Lord the King*; it ſeems to have been generally agreed, That no Acquittal is within the Intention of the Statute, [f] unleſs it be had on an Appeal, (either at the Suit of the Party, or of the King, after a Nonſuit of the Party,) and be of ſuch a Nature as [g] finally to bar all other Proſecutions for the ſame Felony, whether at the Suit of the King, or of the ſame, or any other Party. And therefore it ſeems clear, That no Damages ſhall be recovered on the [h] Abatement of an Appeal, nor on the bare [i] Nonſuit of the Appellant, nor where the Appellant is barred, either by a [k] Demurrer, or by a [l] Plea, ſhewing that he is not intitled to the Appeal, nor on any Acquittal on an inſufficient [m] Original; becauſe in all theſe Caſes the Appellee is liable to another Proſecution for the ſame Felony. And if a Perſon appealed of Murder, be found guilty [n] of Homicide by Miſadventure, or *Se defendendo*, which will be a Bar of any other Proſecution for the ſame Killing, yet it hath been reſolved that he ſhall not recover Damages, not [o] only becauſe it appears that the Appeal was not groundleſs, but alſo becauſe the Appellee is not totally acquitted. But it is [p] clear, That the Appellee is intitled to his Damages, where he is acquitted on an Appeal at the Suit of the King, after a Nonſuit of the Plaintiff, or where he vanquiſhes [q] the Appellant in a Trial by Battel. Alſo if two be appealed, the one as Principal, and the other as Acceſſary; and the Jury be-

[f] S. P. C. 169. Letter B. 2 Inſt. 385. Vide 14 H. 7. 2. pl. 8.

[g] S. P. C. 169.

[h] 4 Co. 47. b. S. P. C. 169. Letter A. 9 H. 4. 2. b. Vide 9 H. 5. 1. Pl. 3.

[i] 2 Inſt. 385. Fitz. conſpiracy 25. But 33 H. 1. pl. 6. Fitz. Coro. 102. 48 Ed. 3. 22. pl. 2. *ſeem doubtful in this Caſe.*

[k] 2 Inſt. 385. Fitz. Coro. 12. S. P. C. 169. Letter A.

[l] 27 Aſs. pl. 25. 2 Inſt. 385. S. P. C. 169.

[m] 4 Co. 45. a. 47. a. Fitz. Coro. 444. 9 H. 5. 2. S. P. S. 169.

[n] 22 Aſs. pl. 77. 2 Inſt. 385. S. P. C. 199.

[o] Vide Supra Sect. 138. pl. 8. 41 Aſs. & 24. Fitz. Coro. 275. 381. Damages 77.

[q] Fitz. Coro. 98. S. P. C. 169. Letter E.

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ing charged on the Acceſſary, as well as the Principal, do acquit the Principal; it ſeems to be [a] agreed, That the Acceſſary ſhall recover Damages, by the Intent of the Statute, without any expreſs Verdict concerning him, becauſe he is impliedly acquitted by the Acquittal of the Principal; for it is impoſſible that there ſhould be an Acceſſary where there is no Principal. And this Reaſon ſeems to hold as ſtrongly for the Damages, where the Acceſſary doth not appear on the Trial or Acquittal of the Principal, becauſe in ſuch Caſe the Acquittal of the Principal is as much an Acquittal of the Acceſſary, as where he doth appear. But it is holden [c] by Sir *Edward Coke*, That ſuch an Acceſſary ſhall not recover Damages, becauſe no Jury can be retorned to aſſeſs them; and Sir *William Staundforde* [d] ſeems to be of Opinion, That ſuch an Acceſſary ſhall not recover Damages, unleſs he be expreſsly acquitted by Verdict, after the Acquittal of the Principal. Yet whether [e] the Juſtices themſelves may not, in a Caſe of this Nature, if they think fit, aſſeſs the Damages, without any Jury, or elſe aſſeſs them by an Inqueſt of Office, may deſerve to be conſidered. Alſo it ſeems to be to little Purpoſe to require an actual Acquittal of a Perſon, where it appears by the Acquittal of another, that he could not be guilty. However it ſeems clear, That a Perſon appealed as Acceſſary to two Principals, ſhall not [f] recover Damages by the Acquittal of one of them; becauſe for what appears he might be acceſſary to the other. Neither [g] ſhall he recover Damages where he is diſcharged by the Death of the Principal, before his Attainder, becauſe it doth not appear but that he might have been guilty.

[a] P. S. P. 168. F. 169. 2 Inſt. 385. 33 H. 6. 1. pl 6.

[b] 33 H. 6. 1. pl. 6.

[c] 2 Inſt. 385.

[d] S. P. C. 168. Letter F. Vide 41 Aſs. pl. 24.

[e] Vide ſupra Sect. 52, 53.

[f] 2 Inſt. 385. Dyer 120. pl. 11. Fitz. coro. 463.

[g] S. P. C. 173. Letter A. 33 H. 6. 1. pl. 6.

Sect. 141. It ſeems at this Day, That if a Defendant, appearing upon erroneous Proceſs to a good Appeal, be acquitted, he ſhall recover Damages by the Intent of the ſaid Clauſe, becauſe ſuch an Acquittal is a good Bar of any other Proſecution for the ſame Felony, and the Life of the Appellee was put in Danger by the [h] Appeal. But there were formerly ſome Opinions, That the Appellee in ſuch a Caſe ſhould not recover Damages, becauſe his Life was not in Danger at the Time of the Trial, for that he might have taken Advantage of the Error in the Proceſs: But granting it to be a good Rule, That the Defendant ſhall not recover Damages where his Life is not in Danger at the Time of the Trial, which yet I find not confirmed by any Authority, beſides the Year-Book of 9 *H.* 5. 2. it may be anſwered, That in the Caſe in Queſtion the Defendant's Life is in danger at the Time of the Trial, becauſe the Error in the Proceſs is ſalved by his Appearance, as ſhall be ſhewn more at large in the Chapter concerning Proceſs.

[h] 9 H. 5. 2. 2 Inſt. 386. Quære S. P. C. 169. b. Fitz. coro. 444. Yelv. 204. Cro. Jac. 284. 4 Co. 45. a.

Sect. 142. If a Perſon who has taken a Releaſe, or prayed the Benefit of the Clergy, waive ſuch Releaſe, or Benefit of Clergy, and put himſelf on his Trial and be acquitted; it is ſaid, [i] that he ſhall recover his Damages, notwithſtanding the Objection that the taking ſuch Releaſe, or making ſuch Prayer, ſeem to carry with them an implied Confeſſion of Guilt.

[i] S. P. C. 169. 173. Letter A. Vide Fitz. coro. 386. & 33 H 6. 1. pl. 6. ſupra Sect.

Sect. 143. Where-ever any Perſon is ſo far acquitted on an Appeal carried on at the Suit of the Party, as to be intitled to his Damages, [k] he ſhall have Judgment for them without any Proceſs to bring in the Party to anſwer to the Damages, becauſe he is ſtill in Court; but where he is ſo acquitted on an Appeal carried on at the Suit of the King after a Nonſuit of the Party, he ſhall not recover Damages, without a *Scire facias*, to bring in the Party, becauſe he was out of Court by the Nonſuit.

[k] S. P. C. 169. Letter C.

Fourthly, In the Conſtruction of theſe Words, *The Juſtices before whom the Appeal ſhall be heard and determined ſhall puniſh the Appellor by a Year's Impriſonment, and the Appellor ſhall nevertheleſs reſtore to the Parties appealed their Damages, according*

according to the Diſcretion of the Juſtices, having Reſpect to the Impriſonment or Arreſtment, that the Party appealed hath ſuſtained by Reaſon of ſuch Appeals, and to the Infamy that they have incurred by the Impriſonment, or otherwiſe, &c. the following Points have been holden.

Sect. 141. Firſt, That Juſtices of *Niſi prius* [a] have no Power to give Judgment for ſuch Impriſonment or Damages, upon an Acquittal before them, whether before or ſince the Statute of 14 *H.* 6; by which it is enacted, *That ſuch Juſtices ſhall have Power in all Caſes of Felony or Treaſon, to give their Judgments, as well where a Man is acquitted, as where he is attainted.* For [b] the Words abovementioned in the Statute of *Weſtminſter* 2, are to be intended of ſuch Juſtices only before whom the whole Plea of the Appeal is heard and determined, and therefore in Strictneſs can extend to the Juſtices of the King's Bench only, where the Appeal is commenced before them, (for that the whole Appeal is in ſuch Caſe heard and determined before them, either in Perſon, or elſe by others delegated by, and repreſenting them,) and not to the Juſtices of *Niſi prius*, who have nothing to do with the Appeal before the Trial, nor any Original Power to try it. And the Statute abovementioned of 14 *H.* 6. hath been conſtrued to intend only to enable Juſtices of *Niſi prius* to give the Principal Judgment, and not to transfer to them from the Court of King's Bench, a Power in collateral Matters. Yet [c] Juſtices of *Niſi prius* have by Uſage not now to be diſputed, gained a Power to aſſeſs the Damages, and to inquire of the Sufficiency of the Plaintiff to anſwer them, and alſo of the Abettors. But I do not find that they have ever given Judgment for the Damages. Yet there is no Doubt [d] but, That if ſuch Juſtices be alſo Juſtices of Aſſiſe, and as ſuch have an Appeal commenced before them, they may, as Juſtices of Aſſiſe, upon the Acquittal of the Appellee, not only inquire of the Damages, *&c.* but alſo give Judgment for them, both by the Letter and Meaning of the Statute.

[a] 10 Ed 4. 14. pl 12. 22 Ed. 4. 19. pl. 44. S. P. C. 169. Letter D. 2 Inſt. 386.

[b] S P. C. 169 Letter D.

[c] 4 Co. 93 b. 2 Inſt. 386. Dyer 120. pl. 10, 11, 12, 13. Bro. Appeal 113. Fitz. coro. 463. 8 H. 5. 6. pl. 26.

[d] 22 Ed 4. 19. pl. 44 Bro. Appeal 113.

Sect. 142. Secondly, That if a Jury give too ſmall Damages to the Appellee, the Court may encreaſe [e] them; from which it ſeems to follow, That if a Jury give too large Damages the Court may abridge them. And ſurely no leſs can be implied by the Statutes ordering, That the Damages ſhall be given according to the Diſcretion of the Juſtices, Reſpect being had to the Impriſonment, *&c.* And this Conſtruction alſo ſeems agreeable to the Rules of Law in other Caſes, by which the Court is ſaid [f] to have a general diſcretionary Power, except in ſome ſpecial Caſes, as Local [g] Treſpaſſes, *&c.* either to increaſe or abridge the Damages found by an Inqueſt of Office; and where a Jury which hath acquitted an Appellee inquires afterwards of the Damages, it ſeems in Reſpect of ſuch Inquiry to be no more than an Inqueſt of Office, tho' it were returned to try the Cauſe.

[e] Cro El. 223. Vide 2 Inſt. 387. 42 Aſs. pl. 19. ſeems to be contrary.

[f] 3 H 6. 29. b. 14 H. 4. 9 b. 8 H. 4. 23. pl. 9. 3 H. 4. 4. pl. 16. 7 H. 6. 31. pl. 16. 19 H 6. 10. pl. 28. Bro. Abridment 36. Vide 27 H. 8. 2. pl. 8 & ſupra Sect 52.

[g] 27 H. 8. 2. pl. 8. 19 H 6. 42. pl. 86. 19 H. 6. 10. pl. 28.

Sect. 143. Thirdly, That if there be ſeveral Appellees, and all of them acquitted, the Damages ought to be ſeverally [h] aſſeſſed as to every one of them; and this doubtleſs is agreeable both to the Letter and Meaning of the Statute, which provides that in the giving the Damages, Reſpect ſhall be had to the Impriſonment and Infamy, and other Damage ſuſtained by Reaſon of the Appeal; and theſe being ſeveral, and receiving different Aggravations from the different Circumſtances of each Perſon's particular Caſe, it cannot but be reaſonable, That the Damages be aſſeſſed ſeverally alſo.

Vide 3 H. 6. 29. b. [h] S. P. C. 170. Letter A. Dyer 120. pl. 10. 11 H. 4. 16. b. 12 Co. 126. 2 Inſt. 386. 41 Aſs. pl. 24. Fitz. Damage 77. 8 H. 5, 6. pl. 26.

Sect. 144. Fourthly, That a Monk or Feme Covert, being appealed without the Abbot, or Husband, cannot have a Judgment for the Damages on their Acquittal, becauſe they are diſabled by the Law to recover any Damages without the Abbot or Husband; and the general Words of a Statute ſhall not be conſtrued to enable Perſons in a Point, wherein the Common Law hath diſabled them. But the Authority of this Opinion, as to a Wife, is queſtioned by [a] *Hobart*, neither do any of thoſe [b] who ſeem to give it greater Weight, bring any other Proof of it, than a Note in *Fitzherbert*'s Abridgment, of a Reſolution to ſuch Purpoſe, in the Time of *Edward* 3. as to the Caſe of a Monk, and an Aſſertion, that the Law is the ſame in the Caſe of a Wife: Againſt which it may be plauſibly argued, That ſince the Impriſonment and Infamy ſuſtained by a Feme Covert, in a malicious Appeal againſt her, are far from being leſs grievous in Reſpect of her Coverture, and are a good [c] Ground of a Writ of Conſpiracy at the Common Law, brought by the Husband and Wife; and ſince the Wife may take any Thing to the Benefit of her Husband, and it appears to the Court that the Appellant by his own Act, without any Default either in the Husband or Wife, gives them a good Title to the Damages; and ſince no expreſs Judgment can be given for the Husband, being not a Party to the Record, and it is moſt for his Advantage, as well as his Wife's, that a preſent Judgment be given: It may perhaps be thought no unreaſonable Conſtruction of the Statute, that in this particular Caſe Judgment ſhould be given for the Wife to recover the Damages, which would as much enure, for the Benefit of her ſelf and her Husband, as an expreſs Judgment for them both, on a Writ of Conſpiracy.

[a] Hobart 98.
[b] 2 Inſt. 385. 11 Co. 77. b. 9 Co. 73. a. 1 Rol. Rep. 170. S. P. C. 170. Letter B. Fitz. coro. 276.
[c] 2 Inſt. 386. 24 Ed. 3. 73. pl. 90. 1 Inſt. 132 b.

However, It is certain, [d] That if the Husband and Wife are both of them appealed and acquitted, they ſhall have a joint Judgment for the Damage done to the Wife, for which the Wife alone ſhall ſue Execution, if the Husband die without ſuing it, and the Husband alone ſhall have Judgment for the Damage done to himſelf.

[d] Fitz. Judgment 108. 2 Inſt. 385, 386. 11 H. 4. 16. b. 17. a. S. P. C. 170. Letter B.

Fifthly, In the Conſtruction of the Words, *And if peradventure the Appellor be not able to recompence the Damages, it ſhall be inquired by whoſe Abettment, by Malice, the Appeal was commenced, if the Party appealed deſire it. And if it be found by the ſame Inqueſt, that any Man is Abettor through Malice, he ſhall be diſtrained by a judicial Writ, at the Suit of the Party appealed to come before the Juſtices*, &c. The following Points have been holden.

Sect. 145. Firſt, That [e] the Abettors are in no Caſe liable to render Damages, where the Appellant himſelf is not liable, tho' never ſo ſufficient; and this is confirmed by Experience, and the manifeſt Purport of the Statute, which by directing that the Abettors be inquired of, where the Appellant appears inſufficient to anſwer the Damages, plainly intimates that they are to be inquired of in ſuch Caſes only, wherein the Appellant muſt have anſwered them if he had been able; and agreeably hereto it ſeems to be ſettled, [f] That a Releaſe of Damages to the Appellant will diſcharge the Abettors, if they can produce it.

[e] S. P. C. 170. Letter D. 171. Letter A. 2 Inſt. 386.
[f] 20 H. 7. 7. b.

Sect. 146. Secondly, That [g] unleſs the Appellant be found by the Jury to be inſufficient, the Abettors ſhall not be inquired of; and yet the Statute doth not expreſly direct that the Jury ſhall inquire of the Sufficiency of the Appellant. But it being the general Method of the Law in other Caſes, of like Nature, to make an Inquiry by a Jury, it is certainly a reaſonable Conſtruction of the general Words of the Statute, that ſuch Inquiry may be made in the preſent Caſe. Yet, whether the Juſtices themſelves may not, if they think fit, make ſuch Inquiry without a Jury, it

[g] 2 Inſt. 386.

it being but an Inquiry of Office, may deſerve to be conſidered for the Reaſons in the 52 and 142 Sections of this Chapter. However, There can be no Doubt but that the Inſufficiency of the Appellant muſt appear by one or the other of theſe Inquiries, before the Abettors can be inquired of.

Sect. 147. Thirdly, That [a] the Abettors may traverſe the Jury's finding the Appellant to be inſufficient, or that they abetted him, *&c.* For it is hard that a Man ſhould be concluded by any Matter whatſoever, found to his Prejudice in an Action, to which he is no way Privy. Alſo it is holden by [b] *Staundforde*, That if a Jury on the Acquittal of one Defendant find that there were no Abettors, yet they may afterwards on the Acquittal of another Defendant find that there were Abettors, becauſe there is no Reaſon that the firſt Inqueſt ſhall bind one who is not Privy to it, and has no Remedy againſt it. But the contrary hereto is holden in the Book of [c] Aſſizes, where the Court refuſed to inquire of the Abettors, on the Acquittal of a Defendant, becauſe it had been found on the Acquittal of another, that there were no Abettors; but this Caſe, if thoroughly examined, ſeems repugnant to it ſelf; for the Jury were permitted on the ſecond Acquittal to tax the Damages, which yet are ſaid to have been taxed before; but to what Purpoſe ſhould this be done, unleſs it were firſt found that the Appellant was ſufficient, or elſe that there were Abettors, which could not but control the firſt finding; as alſo the ſecond Taxation of the Damages muſt do, unleſs it were wholly the ſame with the firſt.

[a] S. P. C. 171. Letter A Quære 8 Ed. 4. 3. pl. 5. 12 Co. 126. 2 Inſt 386. Raſtal's Entries 44. Bro. Appeal 96.
[b] S. P. C. 170. Letter F.
[c] 41 Aſs. 24.

Sect. 148. Fourthly, That [d] if the Appellant be found ſufficient to render part of the Damages, and not the Whole, Judgment ſhall be given againſt the Abettors for the Whole, and not for Part againſt them, and for the other Part againſt the Apppellant; for that thoſe Words of the Stature, *If peradventure the Appellor be not able to recompence the Damages*, muſt be underſtood of all the Damages.

[d] 12 Co. 126. S. P. C. 170. Letter D. 8 Ed. 4. 3. pl. 5. 8 H. 5, 6. pl. 26. 26 H. 8. 3. pl. 14. 2 Inſt. 386. Fitz coro. 29. 386. 463. Bro. Appeal 96 Contra 41 Aſs. pl. 8. Fitz. Coro. 219 Bro. Appeal 74.

Sect. 149. Fifthly, That [e] the Appellee after his Acquittal may ſue for the Damages by Attorney.

[e] Fitz. Coro. 13.

Sect. 150. Sixthly, That [f] though the Statute expreſly give only judicial Proceſs for the Recovery of the Damages againſt the Abettors, yet the Appellee may, if he think fit, take out an Original Writ of Abetment, grounded on the Statute, and therein count to greater Damages than were found by the Jury; which in Reſpect of ſuch Finding, being but in Nature of an Inqueſt of Office, ſhall not conclude the Appellee.

[f] Fitz Action ſur le Statute 28. 2 Inſt. 386, 387.

Sect. 151. Seventhly, That [g] if the Appellee chuſe rather to proceed for the Recovery of his Damages by judicial Proceſs, than by Original; it is ſafeſt for him to make uſe of a Diſtreſs, which is given by the expreſs Words of the Statute; yet there is a Note [h] of an old Caſe, wherein a *Venire facias* was firſt awarded; but it is [i] queſtionable, whether this be juſtified by the Statute or not.

[g] S. P. C. 171. Letter D.
[i] Inſt 139.

Sect. 152. Eighthly, That [k] it is time enough for the Appellee to ſhew the Time and Place of the Abetment, when the Abettors appear upon ſuch Proceſs; and by ſuch Shewing he ſupplies the Omiſſion of the Jury in not finding any Time or Place, on their Inquiry of the Abetment, *&c.*

[g] S. P. C. 171. Letter B. 2 Inſt. 386, 387.
[h] Fitz Coro. 102.
[i] S. P. C. 171. Letter B. 2 Inſt. 386, 387.

Sect 153. Ninethly, That [l] the Nonſuit of an Appellee, either in an Original Writ, or Proceſs againſt the Abettors, whether before or after Appearance, is no Bar of a ſecond Writ or Proceſs.

[k] S. P. C. 171. Letter A. 2 Inſt. 386. Fitz. Coro. 45. [l] S. P. C. 171. Letter C. 1 Inſt. 139. Fitz. Coro. 386.

Sect.

Sect. 154. As to the ſeventh general Point, *viz.* Where the Appellant is to be fined, there can be no Doubt but [a] that by the expreſs Words of the above expounded Statute of *Weſtminſter* 2, 18. Where-ever the Appellant, or his Abettors are by the Purport thereof to render Damages to an Appellee, they are alſo to be fined to the King, and impriſoned for a Year. Alſo it ſeems clear from the general Purport of the [b] Books, that an Appellant appearing to have brought an ill grounded Appeal, whether of Felony or [c] Maihem, ſhall be fined, in many Caſes wherein he is not liable to render Damages by the Statute abovementioned; as where he is [d] Nonſuit, either againſt all or part [e] of the Appellees only, whether after, or, as ſome [f] have holden, before Appearance, or where the Writ abates through the [g] Default of the Appellant in willfully ſuing by a [h] wrong Name, or a [i] vitious Writ, *&c.* and even a *Feme Covert*, [k] ſuing an Appeal known by her to be groundleſs, as for the Death of a Husband whom ſhe knows to be alive, ſhall be fined. But it is certain that where a Writ abates by the Act [l] of God, or for any other Cauſe, no way imputable to the Appellant, he ſhall neither be fined nor amerced. Alſo it is certain, That an Infant is in no Caſe to be fined for a falſe Appeal, but ſome [m] have holden that he may be amerced, which is contradicted by others, who ſay, [n] That an Infant can in no Caſe be amerced.

[a] S. P. C. 170. Letter C. Fitz. Fines 2. 1 Aſs. pl. 9. 22 Aſs. pl. 39. 8 H 4. 17. pl. 2

[b] See the Books cited the following part of this Section. Fitz. Coro. 137. 8 Co. 60. a. S. P. C. 170. Letter C. ſeems contrary.

[c] 40 Aſs pl. 1. Fitz. Coro. 214.

[d] Fitz. Fines 49. 41 Aſs. pl. 8. Fitz. Coro. 219. Damages 77.

[e] 22 Aſs. pl. 82. Fitz. Coro. 182. [f] Fitz. Fines 107. [g] 8 Co. 60. a. [h] 9 H. 5. 1. pl. 3. Fitz. Fines 18. Bro. Fines 16. [i] Fitz. Coro. 121. [k] Bro. Appeal 25. 8 H. 4 17. pl. 2. [l] Fitz. Brief 612. [m] Bro. Fines for Contempt 37. 41 Aſs. pl. 14. [n] Co. Lit. 127. Cro. Ca. 161. Vide 1 Danvers's Abridgment 462. L. pl. 1, 2. 463. pl. 8, 9, 10, 13.

CHAP. XXIV.

Of Approver.

Sect. 1. HAving gone through the ſeveral kinds of Appeals by innocent Perſons, I am now in the ſecond Place to conſider the Nature of an Appeal by an Offender, confeſſing himſelf to be guilty, who is commonly called a Prover or [a] Approver in *Engliſh*, or *Probator* in *Latin*; becauſe he muſt at his Peril prove his Appeal in every Point, and for ſo doing is pardoned of Courſe. And for the better underſtanding the Nature of ſuch Appeal, I ſhall examine the following Particulars.

[a] S. P. C. 142. 3 Inſt. 129. H. P. C. 192.

1. When a Man may be ſaid to become an Approver.
2. Who may be admitted to be Approvers, and who not.
3. In what Caſes
4. Of what Offences.
5. Againſt what Offenders.
6. Before what Juſtices.
7. How they are to be ordered and demeaned, both before and after the Appeal.

8. What

8. What Proceſs is to be awarded againſt the Appellees.
9. In what manner the Court is to proceed upon, and after the Trial.
10. How the Approver is to be rewarded for making good his Appeal.

Sect. 2. As to the firſt Point, *viz.* When a Man may be ſaid to become an Approver, it ſeems [a] agreed, That a Man is then properly an Approver, when being indicted of Treaſon or Felony, before competent Judges, and in Priſon for the ſame, and capable of being an Approver, he confeſſes the Indictment, and is ſworn to reveal all the Treaſons and Felonies he knows, and then before a Coroner enters his Appeal againſt all that were Partners with him in the Crime in the Indictment, being at the Time of the Appeal within the Realm.

[a] H. P. C. 192. 3 Inſt. 129, 130.

As to the ſecond Point, *viz.* Who may be admitted to be Approvers, and who not, I ſhall obſerve,

Sect. 3. Firſt, That [b] a Peer of the Realm cannot be an Approver.

[b] 3 Inſt. 129 H P.C. 192.

Sect. 4. Secondly, That [c] neither a Perſon attainted of Treaſon, or Felony, nor even one outlawed in a Perſonal Action, as ſome [d] ſay, can be an Approver, becauſe by his Attainder or Outlawry, he is out of the Law and his Accuſation ſhall not be of ſuch Credit, as to put any Perſon upon his Trial.

[c] 3 Inſt. 129. H. P. C. 192. S. P. C 146. Letter C. Bro. Coro. 81. 211.

Sect. 5. Thirdly, That [e] an Ideot, or Perſon born deaf and dumb, or any one that is *Non compos* at the Time, or an Infant under the Age of Diſcretion, cannot be an Approver, becauſe no ſuch Perſon ought to be admitted to take the Oath before the Coroner, without which there can be no Approvement.

Fitz. Coro. 112, 127, 167, 387, 443, 445. 11 Aſs. pl. 27. 17 Aſs pl. 4.

Sect. 6. Fourthly, That it is holden both by [f] *Staundforde*, [g] *Coke*, and [h] *Hale*, That no Woman, nor Infant, can be an Approver, but it is obſervable that the Opinions of *Staundforde* and *Coke*, ſeem chiefly to be grounded on this Foundation, that the Appellee may have ſuch-like Exceptions againſt Approvers, as the Defendant may have in an Appeal brought by a lawful Perſon, and therefore may except that the Approver is within Age, or a Woman, *&c.* becauſe ſuch Perſons cannot wage Battel; but it being ſettled at this Day, That theſe are no good Exceptions to an Appeal brought by a lawful Perſon, as hath been more fully ſhewn in the Precedent [i] Chapter, it ſeems to be juſtly queſtionable, whether they are now to be admitted as good Exceptions to an Appeal, by an Approver. To which may be added, That in the Opinion of [k] *Hale*, contrary to that of [l] *Staundforde*, and [m] *Coke*, a Man above the Age of ſeventy, or maimed, may be an Approver, though he cannot wage Battel; from whence it follows clearly, That in the Judgment of *Hale*, there is no Neceſſity that an Approver ſhould be able to wage Battel.

[d] Bro. Appeal 57. Supra Ch. 23. Sect 32. Fitz Coro. 175.
[e] 3 Inſt. 129. S P. C. 147. H. P. C. 192. Vide Supra Ch. 23. Sect. 32.
[f] S P.C. 147. Letter D.
[g] 3 Inſt. 129.
[h] H. P. C. 192.
[i] Sections 30 and 31.
[k] H. P. C. 192.
[l] S. P.C. 147. Letter D.
[m] 3 Inſt. 129.

Sect. 7. Fifthly, That it ſeems to be [n] agreed, That a Perſon in holy Orders cannot be an Approver, becauſe it is a Rule that no Member of the Clergy can ſue any Appeal whatſoever, in a Matter or Cauſe of Death.

[n] S. P. C. 147. Letters A. B. D. H P C. 192. 3 Inſt. 139.

As to the third Point, *viz.* In what Caſes one may be admitted to be an Approver, I ſhall obſerve,

Sect. 8. Firſt, That no [o] one ſhall be admitted to be an Appover, till he hath confeſſed the Crime charged againſt him in his Indictment.

[o] Fitz. Coro. 50. 441. 231.

Sect. 9. Secondly, That it is holden [p] in ſome Books, That he that hath once pleaded not Guilty, cannot be an Approver, but ſhall be hanged, becauſe he is found falſe, and his Confeſſion contradicts his former Plea; yet the contrary hereto is holden by [q] others, and [r] *Staundforde* admits that the

[p] 3 Inſt. 129. H. P. C. 193. S. P. C. 144. Letter B. 145 a. Fitz. Coro. 440.

[r] Ed. 3. 18 pl. 25. 19 H. 6. 47. pl. 103. [q] Finch 387. 12 Ed. 4. 10. pl. 26. Vide 2 H. 7. S. P C. 145.

Court of Grace may admit such Persons to be Approvers; and this is as much as can be contended for in any other Case; for it seems [a] agreed, That the Court is not bound of Right, to admit any Person whatsoever to be an Approver.

Sect. 10. Thirdly, That it is [b] agreed, That any one indicted of Treason or Felony may be an Approver, but that unless the Crime with which a Person is charged, amount either to Felony or Treason, he cannot be an Approver.

Sect. 11. Fourthly, That it is also [c] agreed, That no Person accused of Treason or Felony, can be an Approver, unless he be actually indicted for it; because his Confession amounts not to a Conviction until he be indicted, and consequently puts it not in the Power of the Court to give Judgment against him, when his Appeal shall be rejected or falsified, as every Approvement ought to do.

Sect. 12. Fifthly, That it seems also to be generally [d] agreed, That if a Person indicted be also appealed of the same Felony, he can no longer be an Approver, the Reason whereof seems to be, That though the King may in his Discretion, by admitting a Person to be an Approver, respite the Judgment and Execution of one prosecuted by Indictment, which is his own Suit, yet he cannot delay them in an Appeal, which is the Suit of the Party, and *à fortiori*, therefore it follows, That [e] if a Person be appealed only, and not indicted, he cannot be an Approver.

Sect. 13. Sixthly, That notwithstanding the Appeal of an Approver, may in some Respects be looked upon as the Suit of the King, and equivalent to an Indictment, yet the Appellee [f] of an Approver cannot become an Approver himself, not only because it would falsifie the Appeal of the first Approver, in supposing that he had omitted some of his Partners, but also because it would cause an infinite Delay; for the Appellee of such an Approver might as well become an Approver of others, and so on.

Sect. 14. As to the fourth Point, *viz.* Of what Offences a Person may be admitted to approve another, it seems [g] agreed, That no one can approve another of any other Offence, but the very Crime contained in the Indictment; and therefore that he cannot approve a Man of a Crime of a different [h] Nature, nor even of being accessory [i] before or [k] after to the same Crime, because no Man can abet, or receive himself. But it seems also to be agreed, That inasmuch as the Oath of an Approver is [l] general, to discover all the Treasons and Felonies he knows, if he accuse any Persons of Crimes of a different Nature from his own, whether in the same, or a foreign [m] County, his Accusation will be a reasonable Ground to carry on a Prosecution against them for such Crimes, though it [n] be not of it self of Force sufficient to put them upon their Trials.

Sect. 15. As to the fifth Point, *viz.* Against what Offenders a Person may be admitted to become an Approver, it seems [o] clear, That a Man may be an Approver against any Person whatsoever within the Realm, whether he live in the same or a foreign County, provided he be named of the County wherein he dwells. But it is said, That if it appear either by the [p] Confession of the Approver, or the Return [q] of the Sheriff, or the Testimony [r] of Persons of Credit in the County, That [s] there are no such Persons, as some of those named in the Appeal, *in rerum naturâ*, or within the [t] Realm, or even [u] within the County, whereof they are named in the Appeal, the Approver shall be hanged, unless the [x] Court in Mercy will spare him, because his Appeal in respect of such Persons appears to be false, or to no purpose.

[a] 3 Inst. 129. H. P. C. 194.
[b] 19 H. 6. 47. pl. 103. 3 Inst. 129. 21 Ed. 3. 18. pl. 24. Finch 387. Fitz. Coro. 231. 448. Bro. Coro. 41.
[c] 3 Inst. 129. H. P. C. 193. S. P. C. 143. b. Fitz. Coro. 231. Seems contrary.
[d] 3 Inst. 129. Finch 387. H. P. C. 193. S. P. C. 147. Letter B. 181 Letter C.
[e] 2 Rich. 3. 22. pl. 53. 11 H. 7. 5. pl. 22. Bro. Coro. 228. Fitz. Coro. 442. 40 Ass. pl. 39. Seems contrary.
[f] Fitz. Coro. 113. S. P. C. 147. Letter B. 11 H. 4. 93. pl. 54. Seems contrary.
[g] S. P. C. 143. Letter A. H. P. C. 194. 3 Inst. 129, 130. 2 Inst. 629. Finch 387.
[h] Fitz. Coro. 127, 217. 40 Ass. pl. 39. 11 H. 4. 93. pl. 54.
[i] 27 Ass. pl. 69. 10 Ed. 4. 14. pl. 8. Fitz. Coro. 35. 208. Bro. Coro. 154.
[k] Fitz. Coro. 126.
[l] 2 Inst. 629. H. P. C. 194. 12 Ed. 4. 10. pl. 26.
Fitz. Coro. 37. 387. [m] Fitz. Coro. 437. [n] Fitz. Coro. 126, 127, 387. [o] Fitz. Assise 446. Fitz. Coro. 460. S. P. C. 154. [p] S. P. C. 145. Letter F. 1 Ed. 4. 16. pl. 4. Fitz. Coro. 153. [q] H. P. C 194. 21 H. 6. 34. pl. 1. [r] H. P. C. 195. S. P. C. 145. Fitz. Coro. 133. [s] Bro. Coro. 49. 21 H. 6. 34. pl. 1. H. P. C. 195. [t] 1 Ed. 3. 16. pl. 4. 1 Ass. pl. 2. S. P. C. 145. [u] Fitz. Coro. 46. [x] S. P. C. 145.

Sect.

Sect. 16. As to the ſixth Point, *viz.* Before what Juſtices a Perſon may be admitted to be an Approver, it ſeems to be a ſettled [a] Rule, That a Man may be an Approver before any Juſtices, who have Power to aſſign a Coroner to take the Appeal; and for this Reaſon it ſeems to be [b] agreed, That one may be an Approver before the Juſtices of the King's Brench, and Juſtices of Gaol-Delivery, and Juſtices in Eyre. And upon this Ground it is holden in Sir *Edward Coke*'s *third* [c] *Inſtitute*, and alſo in Sir *Matthew Hale*'s [d] *Pleas of the Crown*, under the Chapter of Approver, That a Man may be an Approver before Juſtices of *Oyer and Terminer*. But the Foundation of this Opinion ſeems to be overthrown by what is ſaid by both theſe [e] Authors in other Places, wherein it is holden that Juſtices of *Oyer and Terminer* cannot Aſſign a Coroner, becauſe it is not within their Commiſſion: And it ſeems to be a [f] general Rule, That thoſe only can receive the Appeal of an Approver who can aſſign a Coroner to take it; and therefore it ſeems to be agreed, That neither a [g] Court-Baron, nor [h] Juſtices of Peace, nor any other ſpecial [i] Juſtices, can receive ſuch Appeal, unleſs their Commiſſion extend to it. And for the like Reaſon it ſeems to be the Opinion of [k] Sir *Edward Coke*, That the Lord High Steward of *England* cannot receive ſuch an Appeal; but this is contradicted by [l] Sir *Matthew Hale*.

[a] 3 Inſt. 130. S. P. C. 143. Letter C. H. P. C. 194.
[b] 3 Inſt. 130. S. P. C. 143. Letter C. H. P. C. 194. Fitz. Aſſiſe 446.
[c] 3 Inſt. 130.
[d] H. P. C. 194.
[e] 4 Inſt. 165. H. P. C. 162.
[f] H. P. C. 194. 3 Inſt. 130. S. P. C. 143. Letter C.
[g] H. P. C. 194. S. P. C. 144.
[h] 9 H. 4. 1. pl. 1. 2 H. 4. 19. pl. 12. 10 Co. 76. b. Bro. Appeal 18. H. P. C. 194.
[i] S. P. C. 144.
[k] 3 Inſt. 130.
[l] H. P. C. 194.

As to the ſixth Point, *viz.* In what manner an Approver is to be ordered and demeſned, both before and after the Appeal, the following Particulars ſeem moſt remarkable.

Sect. 17. Firſt, That it ſeems to be [m] agreed, That where-ever a Perſon indicted of Treaſon or Felony confeſſes the Indictment, whether he appealed others or not, he puts it entirely in the Diſcretion of the Court, either to give Judgment, and award Execution againſt him, or to reſpite them till he ſhall have made good his Appeal.

[m] 21 H. 6. 34. pl. 1. 19 H. 6. 35. pl. 74. Bro. Coro. 48, 49. Fitz. Coro. 66, 67, 447. H. P. C. 194.

Sect. 18. Secondly, That [n] whenever a Perſon is admitted to become an Approver, the Court ſhall aſſign a Coroner to receive his Appeal, and ſhall take an Oath from him to diſcover all the Treaſons and Felonies that he knows.

[n] H. P. C. 194. 2 Inſt. 629. S. P. C. 143. Letter A. Fitz. Coro. 37. 12 Ed. 4. 10. pl. 26.

Sect. 19. Thirdly, That [o] the Court which admits a Man to become an Approver, ought to limit him a certain Number of Days, to make his Appeal in, during which it is holden by [p] ſome, That he is to have a Penny a-day as his Wages from the King; but by [q] others, That he ought not to have it till he has made good his Appeal, by convicting the Appellees.

[o] H. P. C. 195. S. P. C. 145. Letter C. 12 Ed. 4. 10. pl. 26. Fitz. Coro. 37. 439. 26 Aſs. pl. 19.
[p] Fitz. Coro. 439. H. P. C. 194. S. P. C. 145.

Sect. 20. Fourthly, That the Approver during all the Time aſſigned him for making his Appeal, ought [r] to be at his Liberty, and out of Priſon; for [s] he may diſavow an Appeal made by Dureſs of Impriſonment; but if he alledge that an Appeal was extorted from him by ſuch Dureſs, and ſuch Allegation be found to be falſe, either by the Examination of the Coroner, or by an Inqueſt of Office, the Approver ſhall be hanged.

[q] 21 H. 6. 34. pl. 1.
[r] H. P. C. 195. Fitz. Coro. 439. S. P. C. 145. Letter B. Bro. Coro. 34. 11 H. 4. 93. pl. 54.
[s] Fitz. Coro. 118, 169, 255. 12 Aſs. pl. 29. S. P. C. 145. Letter D. Bro. Coro. 99. 26 Aſs. pl. 19. S. P. C. 145. Letter A.

Sect. 21. Fifthly, That [t] the Approver ought to make his Appeal before the Coroner, on every one of the Days limited for the making of it; for if he fail on any one of them, and the Coroner record ſuch Failure, Judgment ſhall be given againſt him.

[t] H. P. C. 195.

And

And ſo ſhall it be [a] alſo, If after he have formed his Appeal, before the Coroner, he make the leaſt Variation in his repeating it before the Court, and the Coroner record ſuch Variation.

Sect. 22. As to the ſeventh Point, *viz.* What Proceſs is to be awarded againſt the Appellees, it ſeems [b] agreed, That the Coroner may award Proceſs to the Sheriff, againſt any Appellee in the ſame County, till it come to the Exigent; but it is certain, That [c] he cannot award it to any other Officer, except the Sheriff, nor to any Sheriff out of his own County: And it ſeems [d] queſtionable, whether he be not reſtrained by the Statute of *Magna Charta*, Ch. 17. to award the Exigent to the Sheriff of his own County. But it ſeems [e] agreed, That the Juſtices of the King's Bench, or Juſtices in Eyre, might by the Common Law as well award Proceſs of Outlawry, as any other Proceſs, againſt Appellees in any County whatſoever.

And it is [f] certain, That Juſtices of Gaol-Delivery may award Proceſs into any County, to apprehend and try them by Force of 28 *Ed.* 1. commonly called the Statute *de Appellatis*; but whether this Statute do impower ſuch Juſtices to award Proceſs of Outlawry into a Foreign County, may deſerve to be conſidered.

As to the eighth Point, *viz.* In what manner the Court is to proceed upon, and after the Tryal, I ſhall obſerve,

Sect. 23. Firſt, That it is in the Election [g] of the Appellee, either to put himſelf upon his Country, or to wage Battel with the Approver.

Sect. 24. Secondly, That let there be never ſo many Appellees, if they wage Battel, the Approver muſt fight them [h] all. But on the contrary, it ſeems to be generally [i] agreed, That if a Perſon appealed by ſeveral Approvers of one and the ſame Felony, vanquiſhes any one of them, he ſhall be acquitted againſt them all, and all of them ſhall be condemned, in the ſame manner as if every one of them had been actually vanquiſhed. But if an Approver having appealed ſeveral of the ſame Crime, be vanquiſhed by one of them, it ſeems to be [k] holden, That his Appeal is ſtill in force againſt the reſt; but the Note in [l] *Fitzherbert*'s *Abridgment*, which ſeems to be the Foundation of this Opinion, ſeems rather to be intended of an Appeal by an innocent Perſon, than of an Appeal by an Approver, in Relation to whom it ſeems to be a general Rule, That being once falſified as to any one of the Appellees, he ought to be condemned, as hath been more fully ſhewn in the 9th and 15th Sections of this Chapter.

Sect. 25. Thirdly, That if the King pardon the Approver or Appellee, hanging the Appeal, the Approvement [m] ceaſes, and the Appellee ſhall be diſcharged; for in the firſt Caſe, by the Pardon the Felony is extinct, and a Man can no longer be an Approver, than while he is under the Guilt of the Crime, whereof the Approvement is made, and liable to be condemned by the Court, whenever his Appeal ſhall be falſified, *&c.* And in the ſecond [n] Caſe, it cannot be doubted but that the King's Pardon will diſcharge the Appellee, becauſe an Approvement is rather the Suit of the King, than of the Party.

Sect. 26. Fourthly, That whether the Appeal of an Approver be falſified by the [o] Confeſſion, or Vanquiſhment [p] of the Approver, or verified by the Conviction or Vanquiſhment of the Appellee, yet if the Offence be within the Benefit of the Clergy, neither the Approver in the firſt Caſe, nor the Appellee in the ſecond, are excluded from it, any more than in the Caſe of an Indictment.

[a] H. P. C. 196. S. P. C. 145. Letter E. 26 Aſs. pl. 19.

[b] H. P. C. 196. S. P. C. 145.

[c] Fitz. Coro. 462. 29 Ed. 3. 42.

[d] Supra ch. 9 Sect. 41, 43.

[e] H. P. C. 196. S. P. C. 146. Fitz. coro. 460.

[f] H. P. C. 196. S. P. C. 146.

[g] H. P. C. 196. S. P. C. 142. Letter D. 3 Inſt. 130. 47 Ed. 3. 5. pl. 10.

[h] S. P. C. 180. Letter E. H. P. C. 196. 47 Ed. 3. 5. pl. 10. 19 H. 6. 35. pl. 74. 3 Inſt. 130.

[i] H. P. C. 196. S. P. C. 74. Letter B. 106 Letter D. 149 Letter B. 180 Letter E. 11 H 4. 93. pl. 49. 21 H. 6. 34. b. 35. a. Bro. coro. 31. 49. 3 Inſt. 130. Fitz. coro. 143. 7 Ed. 3. 12. pl. 29.

[k] S. P. C. 180. Letter E.

[l] Fitz coro. 98.

[m] 47 Ed. 3. 16 pl. 26. 47 Ed. 35. pl. 10. Fitz. coro. 103. H. P. C 201. 3 Inſt. 130. S. P C. 149. Letter B.

[n] H. P. C. 201. Bro. coro. 49. 21 H 6.

[o] Fitz. coro. 128, 365. Fitz. Aſſiſe 421. H. P. C. 197. contra 21 Ed. 3. 17. pl. 21. Bro. coro. 38. Fitz. coro. 447.

[p] Bro. Clergy 5. 26. 11 H. 4 93. pl. 49.

Sect. 27. As to the ninth Point, *viz.* How the Approver is to be rewarded for making good his Appeal; it is said, [a] That if an Approver convict all the Appellees, whether by Battel or Verdict, the King, *ex merito justitiæ*, ought to pardon him as to his Life, and also give him his Wages [b] from the Time of the Appeal to the Time of the Conviction. But [c] it seems, That anciently he ought not to be suffered to continue in the Kingdom. And it is recited by 5 *H.* 4. *ch.* 2. *That diverse notorious Felons, for Safeguard of their Lives, had become Provors, to the Intent, in the mean Time, by Brocage, and great Gifts to pursue and have their Pardons, and then after their Deliverance, had become more notorious Felons than they were before*; and thereupon it is enacted, *That if any Person pray or pursue, or cause to be prayed or pursued for any such Felon so attainted by his own Confession, to have any Charter of Pardon, the Name of him that pursues such Charter be put in the same Charter, making Mention that the same Charter is granted at his Instance. And if he to whom such Charter is granted become a Felon again, the Party who pursued the Charter shall forfeit* 100 l.

[a] H.P.C. 197. S. P. C. 142. Letter D. 3 Inst. 129, 130. contra 19 H. 6. 35. pl. 74. Fitz. con. 6.
[b] Vide supra Sect. 19.
[c] S. P. C. 141. Letter D.

CHAP. XXV.

Of Indictment.

Sect. 1. AN Indictment is an Accusation, at the Suit of the King, by the Oaths of twelve Men of the same County wherein the Offence was committed, returned to inquire of all Offences in General in the County, determinable by the Court into which they are returned, and finding a Bill brought before them to be true; but when such Accusation is found by a Grand Jury, without any Bill brought before them, and [d] afterwards reduced to a formed Indictment, it is called a Presentment; and when it is found by Jurors returned to inquire of that particular Offence only which is indicted, it is properly called an Inquisition. And for the better understanding the Nature of such Proceedings, I shall consider the following Particulars.

[d] Lamb. B. 4. ch. 5.

1. Whether a Grand Jury may find Part of a Bill brought before them true, and Part false.
2. Whether an Indictment be merely the Suit of the King.
3. What Matters are indictable.
4. Where a Man may be tried at the Suit of the King for a capital Offence, without any Indictment.
5. Whether a Man may be arraigned on an Indictment while an Appeal is depending against him for the same Offence.
6. Who may and ought to be Indictors, and in what Manner they are to be returned.
7. Within what Place the Offences inquired of must arise.
8. What ought to be the Form of the Body of an Indictment.
9. What ought to be the Form of the Caption of it.
10. Upon what Proof it may be found.

11. In what Cases it may be quashed.
12. What may be pleaded to it, and in what Manner.

Sect. 2. As to the first Point, *viz.* Whether a Grand Jury may find Part of a Bill brought before them true, and Part false, it seems to be generally agreed, That they must either find *Billa Vera*, or *Ignoramus*, for the Whole; and that if they take upon them to find it specially, or conditionally, or to be true for Part only, and not for the rest, the Whole is void, and the Party [a] cannot be tried upon it, but ought to be indicted anew; and accordingly it hath been resolved, That if a Grand Jury indorse a Bill of Murder, [b] *Billa vera se defendendo*; or *Billa vera* for Manslaughter, [c] and not for Murder; or if they indorse a Bill upon the Statutes of News, *Billa vera*, [d] but whether *Ista verba prolata fuerunt maliciosè, seditiosè, vel econtra, ignoramus*; or if they endorse an Indictment of Forcible Entry, and Forcible Detainer, *Billa vera* [e] as to the Forcible Entry, and *Ignoramus* as to the Forcible Detainer; or if they indorse, [f] That if the Freehold were in *J. S.* or the Possession were in *J. S.* then they find *Billa vera*, the Whole is void.

[a] 2 Rol. Rep. 52. 3 Bulst. 206. 1 Rol Rep. 407, 408.
[b] 2 Rol. Rep. 52. Powle's Case.
[c] 3 Bulst. 206. 1 Rol. 408. 1 Sid. 230.
[d] Leon. 287.
[e] Yelv. 99. 1 Sid. 414. Vide B. 1. c. 64. Sect. 40. Cro. Jac. 151. contra 1 Sid. 99.
[f] Yelv. 15.

Sect. 3. As to the second Point, *viz.* Whether an Indictment be merely the Suit of the King; it is every Day's Practice, That it is so far esteemed the King's Suit, that the Party who prosecutes it is a good Witness to prove it: Also it seems to be agreed, [g] That no Damages can be given to the Party grieved upon an Indictment, or any other criminal Prosecution, [h] notwithstanding the King, by his Commission erecting a New Court, expresly direct, That the Party shall recover his Damages by such a Prosecution. Also, where by Statute Damages are given to the Party grieved by the Offence intended to be redressed, it [i] seems that they cannot be recovered on an Indictment grounded on such Statute, unless such Method of recovering them be expresly given by the Statute; but that they ought to be sued for in an Action on the Statute in the Name of the Party grieved. But it seems [k] certain, That the Court of King's Bench, having the King's Privy Seal for that purpose, may give to the Prosecutor the third Part of the Fine assessed, on a criminal Prosecution, for any Offence whatsoever. Also, it is every Day's Practice of that Court, to induce Defendants to make Satisfaction to Prosecutors for the Costs of the Prosecution, and also for the Damages sustained by the Injury whereof the Defendants are convicted, by intimating an Inclination on that Account to mitigate the Fine due to the King.

[g] 1 Rol. Abr. 220. Letter B. 2 Rol. Abr. 83. Letter P. Cro. Car. 531, 558.
[h] Cro. Car. 558. Vide supra, Ch. 1. Sect. 3, 4, 6, 7, 8.
[i] 1 Rol. Ab. 220. Letter B. 1 Jon. 380. Cro Car. 448.
[k] 1 Keb. 487. pl. 30.

Sect. 4. As to the third Point, *viz.* What Matters are indictable: There can be no Doubt, but that all capital Crimes whatsoever, and also all Kinds of inferior Crimes of a publick Nature, as Misprisions, and all other Contempts, all Disturbances of the Peace, all Oppressions, and all other Misdemeanours whatsoever of a publickly evil Example against the Common Law, may be indicted; but no Injuries of a [l] private Nature, unless they some Way concern the King. Also it seems to be a good general Ground, That where-ever a Statute prohibits a Matter of a publick Grievance to the [m] Liberties or Security of the Subject; or commands a Matter of publick [n] Convenience, as the repairing of the Common Streets of a Town, an Offender against such Statute is punishable, not only at the Suit of the Party aggrieved, but also by way of Indictment for his Contempt of the Statute, unless such Method of Proceeding do manifestly appear to be excluded by it. Yet if the Party offending have been fined to the King in the Action brought by the Party, as it is said [o] that he may in every Action for doing a Thing prohibited by Statute, it seems

[l] 27 Ass. pl. 20. Bro. Indictment 16, Presentment 26.
[m] 2 Inst. 55, 163. Cro Jac. 577.
[n] 1 Mod. 34. 1 Sid. 209.
[o] 8 Co. 60. b. 2 Inst. 131.

ſeems queſtionable, whether he may afterwards be indicted; becauſe that would make him liable to a ſecond Fine for the ſame Offence. Alſo, if a Statute extend only to private [a] Perſons, or if it extend to all Perſons in general, but chiefly concern Diſputes of a private Nature, as thoſe relating to [b] Diſtreſſes made by Lords on their Tenants, it is ſaid that Offences againſt ſuch Statute will hardly bear an Indictment. Alſo, where a Statute makes a new Offence, which was no way prohibited by the Common Law, and appoints a particular Manner of proceeding againſt the Offender, as by Commitment, or Action of Debt, or Information, &c. without mentioning an Indictment, it ſeems to be [c] ſettled at this Day, That it will not maintain an Indictment, becauſe the mentioning the others Methods of proceeding only, ſeems impliedly to exclude that of Indictment. [d] Yet it hath been adjudged, That if ſuch a Statute give a Recovery by Action of Debt, Bill, Plaint, or Information, or otherwiſe, it authoriſes a Proceeding by way of Indictment. [e] Alſo, where a Statute adds a farther Penalty to an Offence prohibited by the Common Law, there can be no Doubt but that the Offender may ſtill be indicted, if the Proſecutor think fit, at the Common Law. And if the Indictment for ſuch Offence conclude *contra formam ſtatuti*, and cannot be made good as an Indictment upon the Statute, it ſeems [f] to be now ſettled, That it may be maintain'd as an Indictment at Common Law, as will be more fully ſhewn in the following Part of this Chapter.

As to the fourth Point, *viz.* Where a Man may be tried at the Suit of the King for a capital Offence without any Indictment, I ſhall endeavour to ſhew,

1. Where one may be ſo tried as having been taken with the Manner.
2. Where one may be ſo tried upon a Verdict.
3. Where upon an Appeal not proſecuted.
4. Whether one may be ſo tried upon a Sheriff's Return.

Sect. 5. As to the firſt Point, *viz.* Where one may be ſo tried as having been taken with the Manner: [g] It is ſaid, That anciently if one guilty of Larceny had been freſhly purſued and taken with the Manner, and the Goods ſo found upon him had been brought into the Court with him, he might be tried immediately without any Indictment; and this is ſaid to have been the proper Method of proceeding in ſuch Manors which had the Franchiſe of Infangtheſe, but ſeems to be altogether obſolete at this Day.

Sect. 6. As to the ſecond Point, *viz.* Where one may be ſo tried upon a Verdict: It is [h] ſaid, That in an Action of Treſpaſs in the King's Bench, *De muliere abductâ cum bonis viri*, if the Defendant be found guilty of having carried away the Woman and Goods with Force, and feloniouſly; or [i] in a Common Action of Treſpaſs in the ſaid Court, for Goods carried away, if it be found that the Defendant feloniouſly ſtole them, he ſhall be put to anſwer the Felony without any farther Accuſation; for ſuch a Charge by the Oath of twelve Men, on their Inquiry into the Merits of a Cauſe, in a Court which has Juriſdiction over the Crime, is equivalent to an Indictment; and the King being always in Judgment of Law preſent in Court, may take Advantage of any Matter therein properly diſcloſed for his Benefit. But ſuch a Verdict in a Court which has [k] no Juriſdiction over criminal Matters, ſeems to be of little Force, becauſe ſuch Court has nothing to do with ſuch Matters. And it ſeems, [a] that

[a] 1 Sid. 209. 1 Modern 34.
[b] 1 Modern 71, 288. 1 Lev. 399. Raym. 205. 1 Vent. 104. 2 Inſt. 121, 132.
[c] Bond's Caſe, Michaelmas 3 Georgii. Shower 398, 399. 3 Keb. 34, 273. Cro. Jac. 643, 644. 3 Mod. 79. Palmer 388. 2 Sid. 434, 439. 6 Mod. 86. 2 Rol. Re. 247, 248, 398.
[d] Dominus Rex verſus Dixon Trin. 3 Georgii.
[e] 3 Modern 118. 1 Sid. 192. Seem contra.
[f] The Caſe of the County, of the City of *Norwich*, adjudged Paſch. 3 Georgii.
[g] Vide ſupra ch. 15. ſect. 41. 7 H. 4. 43. pl. 9. 26 Aſſ. pl. 32. 1 Ed. 3. 13. pl. 6. S. P. C. 28, 29, 148. Letter C. 179 Letter B. H. P. C. 198. Bro. Appeal 130.
[h] 1 Aſſ. pl. 5. Fitz. coro. 156, 357. H. P. C. 199. S. P. C. 94. Letter B. 95. Fitz cor. 122. Fitz utlagary 49.
[i] 13 Aſſ. pl. 5. Bro. coro. 77. H. P. C. 199. S. P. C. 94. Letter B. Fitz. Indictment 31.
[k] S. P. C. 94. Letter B. Fitz. Indictment 31.

[a] 13 Ed. 4. 3. pl. 7. Fitz. coro. 39. [a] that even in the King's Bench, if on any Indictment whatſoever, except only an Inquiſition of Death found before a Coroner on View, a Perſon not mentioned in it be found guilty of the Crime whereof others are indicted, yet ſuch finding ſhall not ſerve for an Indictment againſt him, becauſe it was wholly extrajudicial. [b] But ſuch finding of others guilty, whether in the King's Bench, or other Court of criminal Juriſdiction, upon an Inquiſition of Death, found before a Coroner on View, is of greater Force, becauſe the Jury acquitting the Party ſo indicted, [c] ought to inquire what other Perſon did the Fact; becauſe it appears by a Record of the higheſt Credit, That a Perſon is killed. [d] Alſo, if a Perſon be declared againſt in a proper Court, for having been guilty of a Miſdemeanor, *ſimul cum A. & B. & C.* and thereupon the Jury find *A. B.* and *C.* guilty; it ſeems that ſuch Verdict will ſerve for an Indictment againſt them, becauſe it was not wholly extrajudicial.

[b] 13 Ed. 4. 3. pl. 7.

[c] Supra ch. 9. ſect. 33.

[d] Bro. Indict. 13. 26 Aſſ. pl. 62.

As to the third Point, *viz.* Where one may be ſo tried upon an Appeal not proſecuted, the following Particulars ſeem moſt remarkable.

[e] S. P. C. 147 Letter E. 148. H. P. C. 199, 200. Bro. Appeal. 53. Bro. coro. 3, 16, 49.

Sect. 7. *Firſt*, That an Appeal by an innocent Perſon, and an Appeal by an [e] Approver, are equally favoured in this Reſpect.

Sect. 8. *Secondly*, That regularly where a Perſon is indicted and appealed of the ſame [f] Crime, and the Appeal is not proſecuted, he ſhall not [g] be arraigned upon the Indictment, but upon the Appeal.

[f] H.P.C. 199. 31 H. 6. 11. pl. 6. Fitz. coro. 18. S. P. C. 107. Letter A.

[g] H.P.C. 199. S. P. C. 147. Letter E. 33 H. 6. 1. pl. 6. 4 Ed. 4. 10. pl. 14. Bro. Appeal. 92, 149. S. P. C. 107. Letter A. Fitz. coro. 114.

Sect. 9. *Thirdly*, [h] That if an Appellant be nonſuit in an Appeal by Writ, before he hath declared, the Appellee cannot be arraigned at the King's Suit on the Writ of Appeal; not only becauſe it contains no Certainty of the Circumſtances of the Fact, which it is the proper [i] Office of the Declaration to aſcertain; but alſo, becauſe, for what appears to the contrary by the Record, the Writ might [k] have been purchaſed by a Stranger. And therefore in ſuch Caſe, it ſeems to be in the Diſcretion [l] of the Court, either to diſmiſs the Appellee, or to bail him, till it ſhall appear, Whether there will be any other Proſecution againſt him. But if an Appellant, by Writ, be nonſuit after Declaration, or any Appellant by Bill, or Approver, be nonſuit, it ſeems, [m] That regularly the Appellee ſhall be arraigned at the King's Suit, on the Bill or Declaration; becauſe they muſt be as certain as an Indictment, and cannot be commenced but in Perſon.

[h] S.P.C. 148. Letters A. B. C. H. P. C. 199, 200. Bro. Appeal 67, 130. Fitz. coro. 156, 198, 357, 384.

[i] See ch. 23. Sect. 86, 87, &c.

[k] See ch. 23. Sect. 26, 129.

[l] S.P.C. 148. Letter C. Bro. Appeal

Sect. 10. *Fourthly*, That it ſeems to be a ſettled Rule, That whereever an Appeal is once well commenced, and afterwards ſo far determined, without a full Acquittal, that neither the ſame, nor any [n] other Plaintiff, can ever bring another Appeal againſt the ſame Appellee, he may be arraigned upon the Bill or Declaration, at the Suit of the King; as where an Appellant, having a good Title to the Appeal, makes a Releaſe [o] to the Appellee, hanging the Action, or ſuffers a [p] Nonſuit, or [q] *Retraxit*, or [r] demurs to a good Plea or Iſſue, tendered by the Appellee, which Demurrer is adjudged againſt him; or where ſuch an Appellant or Approver [s] confeſs their Appeal to be falſe, [t] unleſs they make ſuch Confeſſion in the Field, upon a Trial awarded by Battel; for ſuch Confeſſion amounts to a Vanquiſhment of the Appellant or Approver, and conſequently is a full Acquittal of the Appellee; after which his Life ſhall not be brought

67, 130. 27 Aſſ. pl. 7. [m] 1 Aſſ pl. 5. Fitz. coro. 156, 198, 357. [n] S. P. C. 148. H. P. C. 199, 200 Bro. Appeal. 67. [o] S.P.C. 148. Letter B. H. P. C. 200. Bro. Appeal 27. Fitz. coro. pl. 12. [p] H. P. C. 199. S. P. C. 147. Letter E. Cro. Eliz. 460. Fitz. coro. 25, 381. Bro. niſi prius 28. Fitz. utlagary 47. [q] S. P. C. 147. Letter E. 148. Letter B. [r] Dyer 120. pl. 13. [s] S. P. C. 148. Letter B. Fitz. coro. 103. 3 H. 6. 50. pl. 16. 13 Aſſ. pl. 10. H. P. C. 200. 47 Ed. 3. 5. pl. 10. Bro. coro. 3, 16, 49, 78. Bro. Appeal 53. [t] 21 H. 6. 34 pl. pl. 1. S. P. C. 148. Letter B. H. P. C. 200.

again

again into Danger for the ſame Crime. And this ſeems to be the only Reaſon why after ſuch a Vanquiſhment, or a Verdict in his Favour, an Appellee ſhall be diſcharged, as well againſt the Suit of the King, as that of the Party. But it ſeems, That in all other Caſes whatſoever, an Appellee, in an Appeal well commenced; being wholly diſcharged of the Suit of the Party, may be arraigned upon the Appeal, at the Suit of the King, whether ſuch Diſcharge were merely owing to the Act of the Party, as in the Caſes above-mentioned, or to the Act of the Court; as [a] where an Approver is adjudged to be hanged before he hath perfected his Appeal; or partly to the Act of Law, and partly to the Act of the Party, as [b] where an Appeal by a Woman for the Death of her firſt Husband, is abated by her marrying a ſecond; or where an Appellee is diſcharged of an Appeal, for not [c] having been made a Defendant in a former Appeal, brought by the ſame Appellant for the very ſame Fact; or whether ſuch Diſcharge be merely owing to the Act of God; as [d] where an Appellant dies a natural Death, while his Appeal is depending. It ſeems indeed to be holden in the Year Book [e] of 4 *H.* 6. as a general Rule, That where-ever a Writ is abated, the Declaration depending upon it is determined alſo, and conſequently, that the Appellee cannot be arraigned upon it; but to this it may be anſwered, that in the very ſame Place it is allowed, That after a Nonſuit in an Appeal, the Appellee may be arraigned at the Suit of the King; and it ſeems difficult to give a Reaſon, why a Writ is not as much determined upon a Nonſuit as upon an Abatement; to which may be added, that the Point adjudged, which was this, That where a Writ abates for a Miſnoſmer, the Defendant ſhall not be arraigned at the Suit of the King, ſeems plainly to go on this Ground, That where a Suit is ill commenced, the King ſhall not have a greater Advantage from it than the Party might have had; and therefore the Opinion above-mentioned, being alſo contradicted by the beſt [f] Authorities, ſeems to be of little Weight.

[a] S.P.C. 147. Letter E. 21 Ed. 3. 17. pl. 20.
[b] S P.C. 147. Letter E. H. P. C. 200.
[c] 47 Ed. 3. 16. pl. 27. Fitz. coro. 104.
[d] S.P.C. 147. Letter E. 47 Ed. 3. 5. pl. 10.
[e] 4 H. 6 16. Bro. Appeal. 44.
[f] S P.C. 147. Letter E. H P.C. 200.

Sect. 11. *Fifthly*, That where-ever [g] an Appeal abates for Inſufficiency of the Writ, or is barred for want of a good Title in the Appellant; or for any other Matter which ſhews it was ill commenced, the Defendant ſhall not be arraigned upon it at the Suit of the King, becauſe it never had a good Foundation, and cannot give a greater Advantage to the King than to the Party himſelf who ſued it; and therefore it ſeems to be agreed, That if an Appeal be abated for want of Form apparent in the Writ, as [h] for the Omiſſion of the Word *Habeas*, or for falſe [i] *Latin*, or for any other [k] apparent Defect; or if it be abated for a Defect not apparent of it ſelf, but diſcloſed by the Pleadings of the Parties, as for a [l] Miſnoſmer, or wrongful Addition, or any ſuch like Inſufficiency; or if it be abated on Account of the Diſability of the Appellant, as by the Plea of Outlawry [m] for Felony or Treſpaſs; or if it be put without Day upon a Plea of Excommunication of the Appellant; or [n] if it be barred by a Releaſe made before the Commencement of the Suit, or by reaſon that the Time for bringing it was elapſed [o] before it was commenced, or becauſe the Appellant appears to have never had any Right to bring it; as where in an Appeal by one as Wife, it is found that ſhe was [p] never lawfully married to the Deceaſed; or in an Appeal by one as Heir [q] to

[g] S P.C. 148. Letter C. H P.C. 200. Bro. Appeal. 5. Fitz coro 68. Bro. coro. 35. contra 41. Aſſ. pl. 14. Fitz. age 74.
[h] Fitz. coro. 121.
[i] H. P. C. 200.
[k] Bro. coro. 78.
[l] Bro. Appeal. 44 Fitz. coro. 12, 103. 4 H. 6 15, 16.
[m] S. P. C. 149. Letter A. H. P. C. 200. Fitz. utla. 47. 57, 118, 146. 17 Aſſ. pl. 26 Fitz. coro. 175.
[n] S. P. C. 148. Letter B. Fitz. coro. 12. H. P. C. 200. Vide ſupra Sect. 10.
[o] S P.C. 149. Letter A. H. P.C. 200.
[p] S. P. C. 149. Letter A. H. P. C. 200. Fitz. coro. 3.
[q] S. P. C. 149. Letter A. 27 Aſſ. pl. 25. Bro. Appeal. 68. H. P. C. 200. Fitz. coro. 201, 384. contra Bro. Appeal. 53. 13 Aſſ. pl. 10.

his Father, it is found that he hath an elder Brother alive by the ſame Father, *&c.* the Appellee ſhall not be arraigned upon the Appeal, at the Suit of the King, but ſhall be wholly diſcharged of it. But where an Appeal is put without Day on the Plea of [a] Excommunication, the Appellee ſhall be mainpriſed from Day to Day till the Plaintiff be abſolved; and notwithſtanding it ſeems to be holden generally in ſome [b] Books, That where an Appeal is abated for any of the Inſufficiencies abovementioned, or barred, the Appellee ſhall be ſet at large, and be diſcharged, as well againſt the King as the Party; yet [c] ſurely this muſt be underſtood only of ſuch Caſes wherein it appears, That neither any Indictment is preferred, or intended to be preferred by the King, nor any other Appeal preferred, nor intended to be preferred by the ſame or ſome other Party; for otherwiſe ſurely it cannot but be intended, that it muſt be in the Diſcretion of the Court, upon Conſideration of the Circumſtance of the Caſe, either to commit or bail the Appellee for a reaſonable Time, in order to anſwer ſuch further Proſecution, or [d] to bind him to his Good Behaviour for a certain Time, *&c.*

[a] S.P.C. 149. Letter A. 13 Ed. 4. 8. pl. 3. 3 Aſſ. pl. 12. Fitz. mainprize 6.
[b] 18 Ed. 3. 35. pl. 15. Bro. Appeal. 146. 11 Aſſ pl. 27. 17 Aſſ pl 26. Fitz. utlagary 47. Fitz. coro. 12, 68, 167, 175, 201, 384. Bro. nonab. 23.
[c] H.P.C. 200. Vide S.P.C. 149. Letter A. Bro. Appeal. 67, 130. Fitz. coro. 156, 198, 357. Fitz. error. 52. 27 Aſſ. pl. 7. 1 Aſſ. pl. 5. 32 Aſſ. pl 8. 7 H. 7. 5. pl 7.
[d] Fitz. coro. 387. S. P. C. 149. Letter D.

Sect. 12. *Sixthly*, That whatſoever may be pleaded by an Appellee either in Bar or Abatement of an Appeal, while it is carried on at the Suit of the Party, may [e] as well be pleaded by him, when it is proſecuted at the Suit of the King; as [f] that the Appellant ſuing an Appeal of Death, as Wife to the Deceaſed, was never married to him, or [g] that ſhe is outlawed, *&c.* which depends upon the Reaſon taken Notice of in the precedent Sections, *viz.* That an Appeal ſhall not give the King a greater Advantage than the Party himſelf who ſued it.

[e] S P.C. 172. Letter B. Quære, Fitz coro. 452.
[f] Fitz coro. 3.
[g] 21 Ed. 3. 17. pl. 20. Bro. coio 37.

Sect. 13. *Seventhly*, That [h] where-ever an Appellee is arraigned upon the Suit of the King, he may plead the King's Pardon, in the ſame Manner as if he had been arraigned upon an Indictment: But if an Appellee, who by pleading ſuch a Pardon diſcharges himſelf of an Appeal at the Suit of the King, be alſo indicted, it is adviſeable [i] to take Care at the ſame Time when he is in ſuch Manner diſcharged of the Appeal, to have a Ceſſer of Proceſs entered on the Indictment, to prevent the Vexation of a cauſeleſs Proſecution upon it.

[h] Fitz. monſtrans de faits 128. H P.C. 201. S P. C. 104. Letters A B Fitz. coro. 25.
[i] S.P.C. 104. H P. C. 201. 4 Ed. 4. 10. pl. 14. Fitz. coro. 25.

Sect. 14. As to the fourth Point, *viz.* Whether one may be tried at the Suit of the King for a capital Offence, without any Indictment upon a Sheriff's Return, it ſeems to be generally agreed, [k] That neither the Sheriff's Return of a Reſcous, or Eſcape, or of any other Matter, nor any other Record whatſoever, except only an Appeal or Indictment, or ſomething equivalent thereto, as the Verdict of twelve Men, finding a Man guilty in ſuch Manner as is above ſet forth in the ſixth Section of this Chapter, can at this Day put a Man upon his Trial for a capital Offence, as being contrary not only to the Common Law, but to [l] *Magna Charta*, and other [m] Statutes made in Affirmance of it.

[k] H P.C. 201. 2 Inſt. 50. S. P. C. 31. Letter C. 94.
[l] 9 H. 3. ch. 29.
[m] 29 Ed. 3. de prodictionibus cap. 4. 28 Ed. 3. 3. 37 Ed. 3. 18. 44 Ed. 3.

Sect. 15. As to the fifth general Point of this Chapter, *viz.* Whether a Man may be arraigned on an Indictment, while an Appeal is depending againſt him for the ſame Offence, it ſeems [n] that it was the Common Practice before the Statute of 3 *H.* 7. 1. Whether any Appeal were depending or not, not to try any Man upon an Indictment of Murder, before the Year and Day were paſſed, leſt thereby the Suit of the Party ſhould be prevented. And if ſuch Regard were had to an Appeal where none was depending, it cannot be thought but that much [o] greater was

[n] See the Preamble of 3 H. 7. 1. S. P. C. 107. Letter A. Fitz. coro. 44, 82. 7 H. 4. 36. a. 38. pl. 35. 31 H. 6. 11. pl 6. 21 Aſſ. pl. 4. 21 Ed. 3. 23. pl. 16. Fitz. coro. 18, 114. Fitz. reſponder 36.
[o] Vide ſupra ch 19. Sect. 15. Letter B. 95. 2 Ed. 3. 1. pl. 4. 1 H. 7. 6. pl. 2. Fitz. coro. 48, 149. Bro. coro. 130. Vide ſupra ch. 24. Sect. 25.

had

had to one actually depending, whether before or after the Year and Day were passed. [a] Yet it seems that the Court was never in any Case peremptorily bound to suspend the Proceedings on an Indictment in respect of an Appeal, but might always in Discretion, whenever it should seem proper, proceed on an Indictment, hanging an Appeal. And accordingly we find, that in many Instances [b] in the Old Books, when it was holden, That in an Appeal by an Infant, the Parol should [c] demur till his full Age, the Court have proceeded to try a Man upon an Indictment, while an Appeal by an Infant was depending against him, to prevent the Delay, which could not but be occasioned, if the Proceedings should be deferred till the Appellant should come to full Age. Also [d] where a Writ of Appeal of Robbery hath been sued out against a Person under an Indictment for the same Robbery, and ready to be tried, the Court have refused to put off the Trial of the Indictment in respect of such Writ of Appeal; because before the Appellant hath declared, it doth not judicially appear, that both the Indictment and Appeal are for the very same Fact. But if there were no such special Reason to induce the Court to proceed upon an Indictment while an Appeal is depending, it seems to have been the general [e] Practice to suspend the Proceedings on the Indictment till the Appeal were determined.

As to the sixth general Point of this Chapter, *viz.* Who may be, and ought to be Indictors, and in what Manner they are to be returned, I shall endeavour to shew,

1. How these Matters stand by the Common Law.
2. How by Statute.

Sect. 15. As to the first Particular, it seems clear, That by the Common Law every Indictment must be found by twelve [f] Men at the least, every [g] one of which ought to be of the same [h] County, and returned by the Sheriff, or other proper Officer, without the Nomination of any other Person whatsoever; and ought also to be a Freeman, and a lawful liege Subject; and consequently neither under an [i] Attainder of any Treason or Felony; nor a [k] Villein, nor Alien, nor outlawed, whether for a criminal Matter; or, as [l] some say, in a personal Action. And from hence it seems clear, that if it appear by the Caption of an Indictment, or otherwise, that it was found by [m] less than twelve, the Proceedings upon it will be erroneous. [n] Also, it seems that any one who is under a Prosecution for any Crime whatsoever, may, by the Common Law, before he is indicted, challenge any of the Persons returned on the Grand Jury; as being outlawed for Felony, *&c.* or Villeins, or returned at the Instance of a Prosecutor, or not returned by the proper Officer, *&c.*

Sect. 16. Also many Indictments in inferior [o] Courts have been [p] quashed for want of the Words, *Proborum & legalium hominum*, in the Caption of the Indictment, setting forth by what Persons it was found; [q] but this is said to be no Exception to an Indictment found in the Court of King's Bench, or Grand Sessions, or Counties Palatine, and hath been often [r] over-ruled, as to Indictments in other Courts, because all Men shall be intended to be honest and lawful, till the contrary appear.

[a] 4 Co. 45. b. 47. 7 H. 4. 34. pl. 22, 35. pl. 4. 21 H. 6. 28, 29. Fitz. conspir. 6. Fitz. coro. 82. Quære, Fitz. coro. 114. Bro. Appeal 41.

[b] Fitz. coro. 278, 279. 32 Ass. pl. 8. 41 Ass. pl. 14. Bro. Appeal 75. Quære, Fitz. coro. 114. 21 Ed. 3. 23. pl. 16. Bro. Appeal 105, 119.

[c] 13 Ass. pl. 10. Fitz. Age 41, 57. 17 Ed. 4. 2. pl. 4. Bro. Appeal 105.

Vide supra ch. 23. Sect. 30.

[d] 31 H. 6. 11. pl. 6. Fitz. coro 18.

[e] Dyer 296. pl. 20.

See the Books cited to the other Parts of this Section.

[f] Cro. Eliz. 654. 3 Inst. 30. 2 Inst. 387.

[g] See the Preamble of 11 H. 4. 9. 3 Inst. 32, 33, 34. 12 Co. 99.

[h] 2 Rol. Re. 82.

[i] 3 Inst. 32.

[k] Popham 202. 1 Inst. 156. b.

[l] 3 Inst. 32. 21 H. 6. 30. pl. 17. Vide Fitz. Process 208.

Quære, Cro. Car. 134, 147. 1 Jon. 198, 199. [m] Cro. Eliz. 654. pl. 16. [n] 11 H. 4. 41. pl. 8. Bro. coro. 189. Bro. indict. 2. 21 H. 6. 30. pl. 17. Quære, Cro. Car. 134, 135, 147. [o] 1 Keb. 629. pl. 112. 2 Keb. 471. pl. 63. [p] Cro. Eliz. 751. pl. 7. Cro. Jac. 635. Palm. 282, 389. 2 Rol. Rep 400. 2 Rol. Ab. 82. pl. 7. 3 Mod. 122. Poph. 202. [q] 1 Keb. 629. pl. 112. 3 Keb. 471. pl. 63. 1 Lev. 208. [r] 2 Keb. 135, 284. 1 Keb. 50. pl. 5. Cro Jac. 41. 1 Sid. 106, 367. Quære, 2 Rol. Ab. 82. pl. 8.

[a] 11 H. 4. 41. pl. 8. Fitz. indict. 25 coron. 89. Bro. indict. 2. Vide infra Sect. 26. [b] S. P. C. 88. 12 Co. 99. H. P. C 202. 3 Inst. 32, 33, 34. Vide Cro. Car. 134, 135.

Sect. 17. It is resolved in the [a] Year-Book of 11 *H.* 4. by the Advice of all the Justices, That one outlawed on an Indictment of Felony, may plead in Avoidance of it, that one of the Indictors was outlawed for Felony, *&c.* But it seems to be the general [b] Opinion, That this Resolution is rather grounded on the Statute of 11 *H.* 4. *ch.* 9. which was made in the same Term, in which this Resolution was given, than on the Common Law; because it appears by the very same Year-Book, that when this Plea was first proposed it was disallowed; from whence, as I suppose, it is collected, that the subsequent Resolution was founded on the Authority of the said Statute, which may be intended to have been made after the Plea was disallowed, and before the subsequent Resolution, by which it was adjudged good. Yet, considering that the said Resolution was given in the Beginning of *Hilary* Term, and that the Parliament which made the said Statute was not holden before the Beginning of the same Term; and therefore it is not likely that the said Statute was so soon made; and also considering, that the said Resolution was given by Advice of all the Judges, who seem to have been consulted about the Validity of the Plea above-mentioned at the Common Law, and takes no manner of Notice of any Statute, but only of the Law in General, it may deserve a Question, Whether such Plea be not good at the Common Law?

Vide 2 Rol. Abr. 647, 648. Cro. Eliz. 413 Cro. Jac. 672.

Sect. 18. I do not find it any where holden, That none but Freeholders ought to be returned on a Grand Jury; but how far the Law is in this Respect altered by Statute, shall be shewn in the twentieth Section.

Sect. 19. As to the second Particular, *viz.* How the Matters above-mentioned stand by Statute, it is enacted by the Statute of *Westminster* 2, 28. *That old Men above the Age of seventy Years, Persons perpetually sick or infirm at the Time of the Summons, or not dwelling in the Country, shall not be put in Juries, or lesser Assises.* And the Equity thereof, and the Reason of the Thing, seem plainly so far to extend to Grand Juries, that if it shall appear that any of the Persons above-mentioned be returned on a Grand Jury, the Court, into which they are returned, will easily excuse their Non-appearance. But it seems clear, [c] that any such Persons being returned on a Grand Jury, may lawfully serve upon it, if they think fit; neither do I find that they can have an Action on the said Statute for being so returned; for the Writ [d] in the Register grounded on, and reciting the Statute, mentions the Prohibition of it to be, that Men above the Age of seventy Years shall not be put *in Assisis, juratis, vel recognitionibus aliquibus*, which Expressions seem proper for Petit Juries only; whereas the [e] Writ grounded on the Statute of *Articuli super chartas*, set forth more at large in the twenty-first Section, recites the Prohibition thereof to be, that none of the Persons in the Writ mentioned shall be put *in inquisitionibus nec juratis*, which Expression seems to be of a larger Extent, and to take in Grand as well as Petit Juries; by which it seems clearly to be implied, that in the Judgment of those who formed the said Writ, the Statute last mentioned is more general than the former.

[c] 2 Inst. 448. [d] Regist. 180. b. F. N. B. 166. D. Vide 2 Inst. 447, 448. [e] Regist. 178. F. N. B. 165. Vide 2 Inst. 561.

Sect. 20. It is farther enacted by the above-mentioned Statute of *Westminster* 2, 38. *That none shall be put in Assises or Juries, though they ought to be taken in the proper County, who have less Tenements than to the Value of twenty Shillings yearly.* And it is required by the Statute of 21 *Ed.* 1. commonly called the Statute *De his qui ponendi sunt in Assisis, That they should have Tenements to the Value of* 40*s. yearly*; *Provided, That before Justices in Eyre for Common Pleas in their Eyres, and also in Assises, and Juries,* which

which shall be taken in Cities and Burghs, and other trading Towns, the same may be done as was accustomed: And this Exception is likewise mentioned in the [a] Writ in the Register, which seems to be grounded on both these Statutes; by which it appears, That neither by the Common Law nor by these Statutes there was any Necessity in Proceedings before Justices in Eyre, *&c.* That Petit Jurors should be Freeholders; and if so, it seems probable that there is no greater Necessity that Grand Jurors making an Inquiry before them should be Freeholders; and if a Grand Juror before such Justices need not to be a Freeholder, why should there be a greater Necessity that a Grand Juror before other Justices should be a Freeholder? And it is farther remarkable, that the above mentioned Writ in the Register, which seems to be grounded on these Statutes, mentions only Persons put *in assisis, juratis, vel recognitionibus aliquibus*: To which may be added, That the [b] several subsequent Statutes, which require that none but Freeholders or Copyholders of Lands of such a Value shall be returned on Juries, expressly extend only to Juries returned for the Trial of Issues, except only the [c] Statutes concerning Indictments in the Sheriff's Torn, which require, that every Juror finding such Indictment shall have 20 *s.* yearly of Freehold, or 26 *s.* of Copyhold, and also except 3 *H.* 7. 1. 32. which requires that every Juror of an Inquest by which Justices of Peace shall inquire of Concealments by other Inquests shall have Tenements of the yearly Value of 40 *s.* and also except 33 *H.* 6. 2. which requires that every Indictment in the County Palatine of *Lancaster*, of Persons supposed by the same Indictment to live in some other County, and also every Indictment in any other County, of Persons in the same Indictment, supposed to live in the said County of *Lancaster*, shall be taken by such Jurors only as have Lands to the yearly Value of one hundred Shillings: All which seems to make it doubtful, Whether there be any Necessity either by the Common Law or Statute, that a Grand Juror in in any other Case must be a Freeholder.

[a] Register 181. a. F N B 166 D Vide 2 Rol. Ab 647, 648. Cro. El. 413.

[b] 2 H 5 Stat 2 cap 3. 35 H 8. c 6. 27 El. c 6. 4 & 5 Gul. & Mar. c. 24. 7 & 8 Gul. 3.

[c] Vide supra, cap. 10. sect. 65, 66, 67, 68.

Sect. 21. It is enacted by 28 *Ed.* 1. commonly called the Statute of *Articuli super Chartas, cap.* 9. *That no Sheriff, nor Bailiff shall impanel in Inquests, nor in Juries over many Persons, nor others, nor otherwise than as is ordained by Statute: And that they shall put in those Inquests and Juries, such as be next Neighbours, most sufficient, and least suspicious.* And the like is enacted almost in the very same Words by 42 *Ed.* 3. 11. And it is farther enacted by the said Statute of *Articuli super Chartas, That he who doth contrary, and is attainted thereupon, shall pay unto the Plaintiff his Damages double, and shall be grievously amerced to the King.* And the said Statute of *Articuli super Chartas*, is said by Sir *Edward Coke*, to extend to all Suits or Proceedings, either criminal or civil, real, personal, or mix'd, publick or private, Assises or Enquests; and surely that Part of it which ordains, that the most sufficient and least suspicious shall be returned on all Juries, is so agreeable to common Right and natural Justice, that it cannot but be thought to be in Affirmance of the Common Law, and equally to extend to Grand and Petit Juries, and consequently if any Officer shall be wilfully guilty of an Offence against it in the Return of any Jury, he cannot but be punishable for his Contempt, at the Suit of the King. And it is enacted by 23 *E.* 3. 6. *That Justices of Assises shall have Commissions sufficient to inquire in their Sessions of Sheriffs,* &c. *for putting into Panels Jurors suspect and of evil Fame.* And it is farther enacted by 34 *Ed.* 3. 4. *That all Panels shall be made of the next People, which shall not be suspect nor procured. And that the Ministers which do against the same, shall be punished before the Justices who take the Inquest. according to the Quantity of their Trespass,*

2 Inst. 561.

paſs, as well againſt the King as againſt the Party for the Quantity of the Damage which he hath ſuffered in ſuch Manner; and both theſe Statutes ſeem equally to extend to the undue Return of Grand and Petit Juries. But it is obſervable, that the Clauſe of the above recited Statute of *Articuli ſuper Chartas*, which ordains that the Sheriff, *&c.* ſhall render double Damages, extends only to Juries returned in Suits between Party and Party; becauſe it ſays, That he ſhall render them to the Plaintiff, which is a Denomination never given to the King or Proſecutor, where the Proceeding is by Way of Indictment; and accordingly we find that the [a] Writs in the [a] Regiſter grounded on this Statute expreſsly relate to Suits between Party and Party.

[a] Regiſt. 178. F. N. B. 165.

Sect. 22. But the principal Statutes relating to the Return of Grand Juries, are 11 *H.* 4. 9. and 3 *H.* 8. 12. the firſt whereof is as followeth, *Becauſe, that now of late Enqueſts were taken at* Weſtminſter, *of Perſons named to the Juſtices, without due Return of the Sheriff, of which Perſons ſome were outlawed before the ſaid Juſtices of Record, and ſome fled to Sanctuary for Treaſon, and ſome for Felony, there to have Refuge, by whom, as well many Offenders were indicted, as other lawful liege People of our Lord the King, not guilty, by Conſpiracy, Abetment, and falſe Imagination of other Perſons, for their ſpecial Advantage and ſingular Lucre, againſt the Courſe of the Common Law uſed and accuſtomed before this Time: Our ſaid Lord the King, for the greater Eaſe and Quietneſs of his People, will and granteth, that the ſame Indictment ſo made, with all the Dependance thereof, be revoked, adnulled, void, and holden for none for ever: And that from henceforth no Indictment be made by any ſuch Perſons, but by Enqueſts of the King's lawful liege People, in the Manner as was uſed in the Time of his noble Progenitors, returned by the Sheriffs, or Bailiffs of Franchiſes, without any Denomination to the Sheriffs, or Bailiffs of Franchiſes before made by any Perſon, of the Names, which by him ſhould be impanelled, except it be by the Officers of the ſaid Sheriffs or Bailiffs of Franchiſes ſworn and known to make the ſame, and other Officers to whom it pertaineth to make the ſame according to the Law of* England: *And if any Indictment be made hereafter in any Point to the contrary, that the ſame Indictment be alſo void, revoked, and for ever holden for none.*

In the Conſtruction of this Statute the following Points have been reſolved,

Sect. 23. [b] Firſt, That where a Perſon not returned by the Sheriff on a Grand Jury procures his Name to be read among thoſe of others who were actually returned, whereupon he is ſworn of the Grand Jury, *&c.* he may be indicted, either in the King's Bench [c] or before Juſtices of Oyer and *Terminer*, for his Contempt of the Statute; and being found guilty, may be fined and impriſoned; and yet the Statute doth not expreſsly provide that any ſuch Perſon ſhall be any Way puniſhed, but only that the Indictment ſhall be void, *&c.*

[b] 12 Co. 98, 99. 3 Inſt. 33.

[c] Supra, cap. 5. Sect. 32.

Sect. 24. [d] Secondly, That Indictments of Offences not capital are as much within the Statute as Indictments of Treaſon or Felony; and alſo Indictments before Juſtices of Peace as much as Indictments before ſuperior Juſtices; but it hath been [e] queſtioned whether a Coroner's Inqueſt be within the Purview of it.

[d] 12 Co. 98. 3 Inſt. 33. Cro. Ca. 134.

[e] 1 Jon 198, 199. Cro. Ca. 134, 147.

Sect. 25. Thirdly, That a Perſon arraigned upon any Indictment taken contrary to the Purview of the Statute, [f] may plead ſuch Matter in Avoidance of the Indictment, and alſo plead over to the Felony.

[f] H. P C. 202. 3 Inſt. 34. Cro. Ca. 134, 147. 1 Jon. 198, 199.

Sect. 26.

Sect. 26. Fourthly, That a Perſon outlawed upon any ſuch Indictment without a Trial, may alſo ſhew in Avoidance of the Outlawry, that the Indictment was taken contrary to the Purview of the Statute, as ſeems fully to appear from the [a] above-mentioned Year-Book of 11 *H.* 4. 41. But if a Perſon who is tried upon ſuch an Indictment, takes no ſuch Exception before his Trial, it may be [b] doubtful whether he may be allowed to take ſuch Exception afterwards, becauſe he hath ſlipp'd the moſt proper Time for it; except it can be verified by the Records of the ſame Court wherein the Indictment is depending, as by an Outlawry in ſuch Court of one of the Indictors, *&c.* in which Caſe it is [c] ſaid, That any one, as *amicus Curiæ*, may inform the Court of it.

[a] Supra, Sect. 17.

[b] 3 Inſt. 34. Bro. Indict. 2.

[c] 3 Inſt. 34.

Sect. 27. [d] Fifthly, That if any one of the Grand Jury who find an Indictment be within any one of the Exceptions in the Statute, he vitiates the Whole, tho' never ſo many unexceptionable Perſons joined with him in finding it.

[d] 11 H. 4 41. pl 8 H. P. C. 202. S. P. C 88. 3 Inſt 33.

Sect. 28. Sixthly, That if a Priſoner indicted of Felony offer to take any ſuch Exception, he ſhall upon his Prayer have [e] Counſel aſſigned him for his Aſſiſtance in it.

[e] Cro. Ca. 134. 147. 1 Jon. 198.

Sect. 29. [f] Seventhly, That the Court needs not admit of the Plea of the Outlawry of an Indictor, in Avoidance of any ſuch Indictment, unleſs he who pleads it have the Record ready.

3 Inſt. 34. [f] Cro. Ca. 147.

Sect. 30. It ſeems ſomewhat queſtionable, [g] whether Outlawry in a perſonal Action be within the Purview of the Statute.

[g] 1 Jon 198, 199 Cro Ca. 134, 147.

Sect. 31. It is recited by the above-mentioned Statute of 3 *H.* 8. 12. *That many Oppreſſions had been, by the untrue Demeanour of Sheriffs and their Miniſters, done to great Numbers of the King's Subjects, by Means of returning, at Seſſions holden for the Bodies of Shires, the Names of ſuch Perſons, as for the ſingular Advantage of the ſaid Sheriffs and their Miniſters, would be wilfully forſworn and perjured, by the ſiniſter Labour of the ſaid Sheriffs and their Miniſters: By Reaſon whereof many ſubſtantial Perſons, (the King's true Subjects) had been wrongfully indicted of divers Felonies and other Misbehaviour, by their Covin and Falſehood: And alſo ſometimes by Labour of the ſaid Sheriffs, divers great Felonies had been concealed, and not preſented by the ſaid Perſons, by the ſaid Sheriffs and their Miniſters partially returned, to the Intent to compel the Offenders to make Fines, and give Rewards to the ſaid Sheriffs and their Miniſters.*

Vid. ſup Sect. 15.

And thereupon it is enacted, *That all Panels to be returned, which be not at the Suit of any Party, that ſhall be made, and put in by every Sheriff and their Miniſters afore any Juſtice of Gaol-Delivery, or Juſtices of Peace, whereof one to be of the* Quorum, *in their open Seſſions, to enquire for the King, ſhall be reformed by putting to, and taking out of the Names of the Perſons, which ſo be impanelled by every Sheriff and their Miniſters, by the Diſcretion of the ſame Juſtices, before whom ſuch Panels ſhall be returned. And that the ſame Juſtice and Juſtices ſhall command every Sheriff, and their Miniſters in his Abſence, to put other Perſons in the ſame Panel by their Diſcretions: And that the ſame Panels ſo reformed by the ſaid Juſtices be good and lawful. And that if any Sheriff, or any their Miniſter, at any Time do not return the ſame Panels ſo reformed, that then every ſuch Sheriff and Miniſter ſo offending, ſhall forfeit for every ſuch Offence* 20 l. *&c.*

Sect. 32. It hath been reſolved that this Statute doth not take away the Force of the above-recited Statute of 11 *H.* 4. in any Point wherein it doth not expreſsly vary from it; from whence it follows, That if any of the Jurors who find an Indictment be outlawed, or returned by a Sheriff or Bailiff, at the Nomination of any other Perſon, the Indictment may be avoided in the ſame Manner as before, by Force of 11 *H.* 4. except

H P C. 202. 3 Inſt 33. Contra S.P.C. 88.

cept such Nomination be made by the Justices authorized by 3 *H.* 8. to reform that Panel.

[a] 26 Ass. pl. 32. Fitz Coro. 194 Vide supra, Sect. 5.

Sect. 33. As to the seventh general Point of this Chapter, *viz.* Within what Place the Offences inquired of must arise, notwithstanding it were anciently [a] holden, That if one who had committed a Robbery in the County of *A.* were taken with the Manner in the County of *B.* he might be put to answer in the County of *B* (by which I suppose it is intended that he might be put to answer on an Indictment found in the County of *B.*) and then tried by a Jury from the County of *A.* Yet it seems to be generally [b] agreed at this Day, That by the Common Law no Grand Jurors can indict any Offence whatsoever, which doth not arise within the Limits of the Precinct for which they are returned: And upon this Ground it hath been resolved to be a fatal Exception to an Indictment, that it doth not appear by it that the Offence arose within the [c] County, or [d] Riding, or [e] other special Division, or [f] Precinct, for which the Jury which found it was returned. And *à fortiori* therefore it must be a [g] good Exception, that it expressly appears by the Indictment that the Offence arose in a County, *&c.* different from that for which the Jury was returned. And it is [h] holden, That even the finding of a collateral Matter expressly alledged in the Indictment to have happened in a different County, is void. But [i] some have holden, That if the County be expressed in the Margent of an Indictment, the Vill or Vills in which the Offence is laid, shall be intended to be in the same County. But the greater [k] Number of Authorities require a greater Certainty, as by expressly alledging such Vill or Vills in the County named in the Margent, or *in comitatu prædicto*, which seems to be sufficient where but one County is named before; but to be [l] uncertain where a County is named in the Body of the Indictment different from that in the Margent. But it seems from the Authority of [m] *Baud*'s Case, That if a Fact be alledged in *B. juxta D in Comitatu E.* being the same County for which the Jury is returned, the County is set forth with sufficient Certainty, because *B.* shall be intended to be in the same County with *D.* Also if one be indicted for a Rescous from an Arrest in the County of *B* it hath been [n] holden, that it is needless to express the County wherein the Rescous was done with greater Certainty, because it shall be intended to have been in the same County wherein the Arrest was; *à* [o] *fortiori* therefore, if a Fact be alledged at *B.* in the Parish of *C.* in the County of *D.* it cannot but be intended that *B.* as well as *C.* is in the County of *D.*

[b] Vide supra, Sect. 5.
[c] 3 Inst. 49. H. P. C. 203.
[d] 1 Bulst. 203, 205. Cro. El. 157 pl. 8. Dy. 69. pl. 29. 2 Keb. 302. pl. 94.
[e] Cro Jac. 276.
[f] Cro Jac. 276.
[g] Keilw. 89, 33 pl 6.
[h] Stedman's Case, Cro. El. 137.
[i] Cro. Jac. 17. 1 Bulst 203. 1 Sid. 312. Keilw. 33. pl. 6
[k] Cro Jac. 167. 1 Sid 345, 346. Cro. El 606. pl 4. 677. pl. 6. 738. pl. 10 751. pl. 7. Vide Cro Jac. 96. 276. 2 Keb. 302 pl. 94.
[l] Cro. El. 100. pl. 5. 184. pl. 1. 436. pl 51.
[m] Cro. Jac 41
[n] Cro. Jac. 345 Vide Fitz. Coro. 45. Attachm. 1. Retorn de Viscount 32. Bro. Retorn de Brief 97. 3 H. 7. 11. pl. 3.

Sect. 34. But of whatsoever Nature an Offence indicted may be, whether local or transitory, as seditious Words, or Battery, *&c.* it seems to be [p] agreed, That if upon Not guilty pleaded it shall appear that it was committed in a County different from that in which the Indictment was found, the Defendant shall be acquitted, as shall be shewn more at large in the Chapter concerning Evidence.

[o] Cro. El. 108. pl. 3.
[p] H P C 203. Kelynge 15.

Sect. 35. And therefore at the Common Law, if a Man had died in one County of a Stroke received in another, it seems to have been the more [q] general Opinion, that regularly the Homicide was indictable in neither of them, because the Offence was not compleat in either, and no Grand Jury could inquire of what happened out of their own County. But this Inconvenience is remedied by 2 *&* 3 *Ed.* 6. 24. by which it is enacted, *That where any Person shall be feloniously stricken, or poisoned in one County, and die of the same Stroke or Poisoning in another County, that then an Indictment thereof found by Jurors of the County, where the Death shall happen, whether it shall be found before the Coroner, upon the Sight of such dead Body;*

[q] Vide B. 1. Ch 31 S. 13 6 H. 7 10.

pl 7 10 H. 7. 28. pl. 20. Fitz. Indictment 23. *See the Preamble of* 2 & 3 Ed. 6. 24. Contra Fitz. Coro. 373. Indictm 24. 7 H. 7. 8. pl. 1. 10 H. 7. 20. pl. 8. Fitz. Cor. 446.

Body; or before the Juſtices of Peace, or other Juſtices or Commiſſioners, which ſhall have Authority to inquire of ſuch Offences, ſhall be as good and effectual in the Law, as if the Stroke or Poiſoning had been committed and done in the ſame County where the Party ſhall die, or where ſuch Indictment ſhall be ſo found.

Sect. 35. And it ſeems that by the Common Law, if a Fact done in one County prove a Nuſance to another, it may be indicted in [a] either County.

[a] H P.C. 203. Fitz Bar. 279. Aſſiſe 446. 19 Aſſ. pl. 6.

Sect. 36. Alſo by the Common Law if one guilty of Larceny in one County carry the Goods ſtoln into another, he [b] may be indicted in either, as hath been more fully ſhewn in the firſt [c] Book.

[b] Keilw. 160. b. 4 H. 7. 5. b. Fitz. Cor. 62.

[c] Ch. 33 S. 9.

Sect 37. Alſo if a Man marry two Wives, the firſt in a foreign Country, and the ſecond in *England*, it is [d] holden that he may be indicted and tried for it in *England* upon the Statute of 1 *Jac.* 1. 11. which makes it Felony; becauſe the ſecond Marriage alone was criminal, and the firſt had nothing unlawful in it, and was merely of a tranſitory Nature: But where the ſecond Marriage is in a foreign Country, it hath been holden, That the Party is not triable on the Statute above-mentioned; but this ſeems contrary to the Purview of it, as hath been more fully ſhewn in *Book* 1. *Chap.* 43. *Sect.* 7.

[d] 1 Sid. 171. Kelynge 79, 80.

Sect. 38. Alſo if a Woman be taken with Force in one County, and carried into another, and there married, the Offender may be indicted and tried in the ſecond County, upon the Statute of 3 *H.* 7. 2. againſt Forcible Marriage, becauſe the Continuance of the Force in ſuch County amounts to a Forcible Taking within the Statute. But if an Offence in ſtealing, taking away, withdrawing, or avoiding a Record, againſt the Purport of 8 *H.* 6. 12. be committed partly in one County and partly in another, ſo as not to amount to a compleat Offence within the Statute in either, it is ſaid that the Party cannot be indicted for a Felony in either, but only for a Miſpriſion.

Book 1. Ch. 42. Sect. 19.

Book 1. Ch. 45. Sect 6.

Sect. 39. It is enacted by 26 H 8. 6. *For the Puniſhment and ſpeedy Trials, as well of the Counterfeiters of any Coin currant within this Realm, waſhing, clipping, or miniſhing of the ſame, as of all and ſingular Felonies, Murders, wilful burning of Houſes, Manſlaughters, Robberies, Burglaries, Rapes, and Acceſſaries of the ſame, and other Offences feloniouſly done, within any Lordſhip Marcher of Wales, that the Juſtices of the Gaol-Delivery, and of the Peace, and every of them for the Time being in the Shire or Shires of* England, *where the King's Writ runneth, next adjoining to the Lordſhip Marcher, or other Places in* Wales, *where ſuch counterfeiting waſhing, clipping, or miniſhing of any Coin currant within this Realm or Murther ſhall be committed; or where any other Felonies or Acceſſaries ſhall be committed, ſhall have full Power at their Seſſions and Gaol-Delivery, to enquire by Verdict of twelve Men of the ſame Shire or Shires next adjoining, within* England, *where the King's Writ runneth, there to cauſe all ſuch Counterfeitors, Waſhers, Clippers of Money, Felons, Murderers, and Acceſſaries to the ſame, to be indicted, according to the Laws of this Land, in like Manner and Form, as if the ſame Petit Treaſons, Murders, Felonies, and Acceſſaries to the ſame, had been done within any of the ſaid Shires within the ſaid Realm: And alſo to hear, determine, and judge the ſame, according to the Laws of the Realm.*

Sect 40. And it ſeems generally to have been [e] holden, That the Power given by this Statute to the Juſtices of Gaol-Delivery and of Peace, in the adjoining *Engliſh* Counties, in relation to the Offences therein mentioned, is not repealed by 34 & 35 *H* 8. 26. which impowers the Juſtices of the Grand Seſſions in *Wales* to take Indictments of ſuch Offences. But it hath been [f] reſolved that an Acquittal on an Indict-

[e] 1 Mod. 64, 68. 2 K. b 685. Cro. Car. 247. 331. *See* Book 1. Ch. 31. Sect 14.

[f] 1 Lev. 118.

ment at the Grand Seſſions is a good Bar of an Indictment for the ſame Crime in an *Engliſh* County.

Sect. 41. It is enacted by 28 *H.* 8. 15. which hath been more fully ſet forth and expounded in *Book* 1. *Ch.* 37. *That Treaſons, Felonies and Robberies,* &c. *upon the Sea,* &c. *ſhall be inquired,* &c. *in ſuch Places in the Realm as ſhall be limited in the King's Commiſſion, in like Manner as if ſuch Offences had been committed on the Land.*

Sect. 42. It hath been [a] reſolved, That this Statute extends not to Offences done in Creeks or Ports within the Body of a County, becauſe ſuch Offences were always cogniſable by the Common Law.

Sect. 43. Alſo it hath been [b] reſolved, That the Force of this Statute, in relation to Treaſons done upon the Sea, is not taken away by 35 *H.* 8. 2. more fully ſet forth in the forty ſeventh Section.

Sect. 44. It was made a [c] Doubt upon this Statute, Whether one who was an Acceſſory at Land to a Felony at Sea, were triable by the Admiral within the Purview of it; but this is ſetled by [d] 11 & 12 *W.* 3. *c.* 7. which enacts, That Acceſſories to Piracy before or after, in ſuch Manner as is ſet forth more at large in that Statute, ſhall be inquired of, tried, and adjudged according to the ſaid Statute of 28 *H.* 8. 15.

Sect. 45. It is farther [e] enacted by the ſaid Statute of 11 & 12 *W.* 3. *c.* 7. That all Piracies and Felonies upon the Sea, &c. may be tried at Sea, or upon the Land, in his Majeſty's Plantations, in ſuch Manner as hath been more fully ſet forth in the firſt Book.

Sect. 46. It ſeems to have been a great [f] Doubt before the making of the Statute of 35 *H.* 8. 2. in what Manner and in what Place High Treaſon done out of the Realm was to be tried; for ſome ſeem to have holden, That it was triable only upon an [g] Appeal before the Conſtable and Marſhal; others, that it might be tried upon an Indictment, laying the Offence in [h] any County where the King pleaſed; and others, that it was triable by Way of Indictment in that County [i] only wherein the Offender had Lands: But ſurely it [k] cannot reaſonably be doubted, but that it was triable ſome Way or other, for it cannot be imagined that an Offence of ſuch dangerous Conſequence, and expreſsly within the Purview of 25 *Ed.* 3. ſhould be wholly diſpuniſhable, as it muſt have been if it were no Way triable.

Sect. 47. *But for a plain Remedy, Order, and Declaration of this Matter,* it is enacted by 35 *H.* 8. 2. *That all Manner of Offences, being then already made or declared, or after to be made or declared, by any of the Laws and Statutes of this Realm, to be Treaſons, Miſpriſions of Treaſons, or Concealments of Treaſons, and done, perpetrated, or committed, by any Perſon or Perſons, out of this Realm of* England, *ſhall be from thenceforth inquired of, heard and determined before the King's Juſtices of his Bench for Pleas to be holden before himſelf by good and lawful Men of the ſame Shire, where the ſaid Bench ſhall ſit and be kept; or elſe before ſuch Commiſſioners, and in ſuch Shire of the Realm, as ſhall be aſſigned by the King's Majeſty's Commiſſion, and by lawful Men of the ſame Shire, in like Manner and Form to all Intents and Purpoſes, as if ſuch Treaſons, Miſpriſions of Treaſons, or Concealments of Treaſons, had been done, perpetrated and committed within the ſame Shire, where they ſhall be ſo inquired of, heard and determined, as is aforeſaid.*

In the Conſtruction of this Statute the following Points have been reſolved,

[a] Book 1. Ch. 37. Sect. 11. Quære Moor 121. pl. 265.
[b] 3 Inſt. 11, 112. 4 Inſt. 124.
[c] Yel. 134, 135. 13 Co. 51, 52. Noy 131. Contra H. P. C. 77. 3 Inſt. 112. Book 1. Ch. 37 Sect. 7.
[d] Book 1. Ch. 37. Sect. 15.
[e] Book 1. Ch. 37. Sect. 12.
[f] 19 Ed. 4. 6. b. *See the Preamble of* 35 H 8. 2.
[g] Vide ſupra, Ch 4 Sect. 9. *and* Ch. 23. Sect. 29 Dyer 131. pl. 75.
[h] 1 Inſt. 261.
[i] H.P.C. 204 3 Inſt. 11.
[k] Contra Dyer 131. pl. 75. *and* 11 Co 63. a. 1 And. 262.

Sect.

Sect. 48, First, That if the Court of King's Bench, or Commissioners appointed in pursuance of the Statute, after having taken an Indictment of a foreign Treason, remove into a different County from that in which the Indictment was found, the [a] Trial shall be by Jurors returned from the first County; and this is most agreeable to the general Course of the Common Law; which [b] requires, That Indictments shall be tried by Jurors of the same County in which they were found.

[a] H.P.C. 204. 3 Inst. 34.

[b] S.P.C. 90. Letter B. Vid. Dy. 286. pl. 45.

Sect. 49. Secondly, That the Commissioners and County for the Trial of such Treasons, are [c] sufficiently assigned by the King in Pursuance of this Statute, by his either writing his Name to the Commission that appoints them, or signing the Warrant to the Lord Keeper for the Commission.

[c] H. P. C. 16, 205. 3 Inst. 11.

Sect. 50. Thirdly, That a Treason done by an [d] *Irishman* in *Ireland*, is triable in *England* according to the Purview of this Statute; for *Ireland* being out of the Realm of *England*, a Treason committed [e] in it is certainly within the Letter of the Act; and nothing within the Letter of a Statute made for enlarging the Jurisdiction, and supplying the Defects of the Common Law, shall easily be construed out of the Meaning of it. And therefore it seems reasonable, That any Offence which by 25 *Ed.* 3. or any other subsequent Statute, either expressly extending to, or [f] received in *Ireland*, is equally Treason in *Ireland* and *England*, may be tried here by Vertue of this Statute. But if an Offence be made Treason by an *Irish* Statute, which is not Treason in *England*, I see not how it can be tried here; since being neither made nor declared to be Treason by any Law or Statute of this Realm, it is not within the Description of the Offences provided for by 35 *H.* 8. To which may be added, That Offences beyond Sea, to be tried here by Vertue of that Statute, are to be inquired of and determined in like Manner as if they had been committed in such Shire wherein they shall be inquired of and determined; but if an Offence which is Treason in *Ireland* and not in *England*, had been committed in any *English* County, it is manifest that it could not be punished as Treason. Also it hath been [g] resolved, That no Treason committed in *Ireland* by an *Irish* Peer, is triable in *England*, because he is intitled to a Trial by his Peers, which cannot be had in *England*.

[d] 3 Inst. 11. 1 And. 262, 263.

[e] H. P. C. 16, 205. 11 Co. 63. a. Vide 3 Keb. 560, 566. Warner's *Case*. See B 1. Ch. 17. Sect. 67.

[f] 1 And 263. 1 Sid. 357. pl. 11.

[g] Dyer 360. pl. 6. Vide 1 And. 262.

Sect. 51 Fourthly, That this Statute is not [h] repealed by 1 & 2 *Ph.* & *Mar.* 10. which enacts, *That all Trials hereafter to be had, awarded or made, for any Treason, shall be had and used, according to the Common Laws of the Realm, and not otherwise.* For it is the manifest Purport of this Statute to restore the ancient Course of the Common Law as to the Trial of Treasons in which great Innovations had been made by Statutes in the Reigns of King *Henry* VIII. and *Edward* VI. but it cannot be thought agreeable to the Intention of it to abrogate any Statute, which in a doubtful Case settled and confirmed the Jurisdiction of the Common Law, and gave a Method of Trial as agreeable as possible to its usual and ordinary Manner of Proceeding.

[h] 11 Co. 63. H. P. C. 205. 3 Inst. 24. 1 And 262. S. P. C. 90. Letter B. Dyer 131. pl. 75, 286. pl. 45, 298. pl. 29, 300. pl. 38.

Sect. 52. It was a great Doubt at the Common Law, [i] Whether an Accessory in one County to a Felony in another, were indictable in either, but this is remedied by 2 & 3 *Ed.* 6. 24. by which it is enacted, That such an Accessory may be indicted and tried in the same County wherein he was Accessory. But intending more fully to treat of this Matter in the Chapter concerning the Arraignment of the Principal and Accessory, I shall refer the Reader thither for the farther Consideration of it.

[i] Keilw. 67. Dyer 38.

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As to the eighth general Point of this Chapter, *viz.* What ought to be the Form of the Body of an Indictment, I ſhall endeavour to ſhew:

1. What ought to be the Form of the Body of an Indictment at Common Law.
2. What of an Indictment upon a Statute.

As to the firſt of theſe Particulars I ſhall endeavour to ſhew,

1. How the Body of an Indictment at Common Law, ought to ſet forth the Subſtance and Manner of the Fact.
2. How the Perſons mentioned or referred to in it.
3. How the Thing wherein the Offence was committed.
4. How the Circumſtances of Time and Place.
5. Where it may be vitiated by falſe, or improper *Latin*, or the Uſe of *Engliſh* inſtead of *Latin*.
6. Where the Offence indicted may be laid jointly, and where ſeverally, and where both jointly and ſeverally, and where the Offences of ſeveral Perſons may be laid in one Indictment.
7. Whether the Words *Vi & Armis* be in any Caſe neceſſary.
8. Whether it be neceſſary to lay the Offence *contra pacem*.
9. Whether it be neceſſary to lay it *contra coronam & dignitatem Regis*.
10. Whether it be neceſſary to lay it *in contemptum Regis*.
11. Whether it be neceſſary to lay it *illicitè*.
12. Whether a Defect in any of theſe Particulars be amendable.

As to the firſt Point, *viz.* How the Body of an Indictment at Common Law ought to ſet forth the Subſtance and Manner of the Fact, I ſhall endeavour to ſhew:

Firſt, In what Manner it ought to ſet them forth in relation to the Offence of the Principal.

Secondly, In what Manner in relation to the Offence of the Acceſſory.

As to the firſt of theſe Particulars, *viz.* In what Manner the Body of an Indictment at Common Law, ought to ſet forth the Subſtance and Manner of the Fact, in relation to the Offence of the Principal, I ſhall obſerve,

Sect. 53. Firſt, That no Periphraſis or Circumlocution whatſoever will ſupply thoſe Words of Art which the Law hath appropriated for the Deſcription of the Offence, as [a] *Murdravit* in an Indictment of Murder; [b] *Cepit*, in an Indictment of Larceny; [c] *Mayhemiavit*, in an Indictment of Maim; [d] *Felonicè*, in an Indictment of any Felony whatever; [e] *Burglariter* or *Burgulariter*, or elſe *Burgalariter*, in an Indictment of Burglary; [f] *Proditoriè*, in any Indictment of Treaſon; [g] *Contra ligeantiæ ſuæ debitum*, in an Indictment of High Treaſon againſt the King's Perſon.

Sect. 58. Secondly, That in an Indictment, as well as in an [h] Appeal of Rape, the Fact ſeems to be ſufficiently aſcertained by the Words *Felonicè rapuit*, without adding *carnaliter cognovit*, or firſt ſetting forth the ſpecial Manner of the Terror or Violence, and then concluding that the

[a] Supra Ch. 23. Sect. 77. Dyer 304. pl. 56. Bro. Indict. 7. Cro. El 920

[b] Fitz. Coro. 119 Indictm. 2. 8. Bro. Coro. 76. 12 Aſſ pl 32. 2 Ed. 3. 1. pl. 3. Supra Ch. 23. Sect. 77.

[c] Supra Ch. 23. Sect. 77. [d] 2 Ed. 3. 1. pl. 3. 2 Ed. 3. 18. pl. 1. Fitz. Indictment 3. Supra Ch. 23. Sect. 77. Bro. Indictment 36 Bro. Appeal 48. 18 Ed. 4. 16. pl. 28. Cro. El. 193 pl. 7. 4 Co. 41. b. 5 Co. 121. b. See 9 Co. 69. a. [e] Daliſon 22. 4 Co. 39 b. H P. C. 207. 5 Co. 121. b. Cro. El. 920. [f] H. P. C. 11. 3 Inſt. 15. Fitz Coro. 55. S P. C. 3. Letter A. 3 H. 7. 10. pl. 2. [g] 3 Lev. 396. Calvin's *Caſe*, 5, 6, 10.

[h] Supra Ch. 23. Sect. 79. Letter I. Fitz. Indictment 18. 9 Ed. 4. 26.

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Defendant *sic felonicè rapuit, &c.* Also it seems, That the like general Manner of setting forth the Offence, which is sufficient in an [a] Appeal of Larceny, will also be sufficient in an Indictment.

Sect. 59. Thirdly, That in other Cases it is [b] generally a good Rule in Indictments as well as Appeals, That the special Manner of the whole Fact ought to be set forth with such Certainty, that it may judicially appear to the Court, That the Indictors have not gone upon insufficient Premisses. And upon this Ground it seems to be agreed, That an Indictment finding that a Person hath feloniously broken Prison, without shewing the Cause of his Imprisonment, *&c.* by which it may appear that it was of such a Nature, that the breaking might amount to Felony, is [c] insufficient. Also [d] Indictments against Persons for refusing to be sworn Constables, after they had been *legitimo modo electi*, have been quashed for not shewing the Manner of the Election, that it might appear to have been such as obliged the Defendants to have undertaken the Office. Also it hath been [e] adjudged, That an Indictment of Burglary is insufficient without the Word *Noctanter*. Also it seems to be [f] agreed, That an Indictment charging a Man with a Nusance in respect of a Fact, which is lawful in it self, as the erecting of an Inn, *&c.* and only becomes unlawful from particular Circumstances, is insufficient, unless it set forth some Circumstances which make it unlawful: But it is said that this is needless where the Thing indicted is unlawful in its own Nature, as the keeping of a Bawdy-house, *&c.* Also it hath been [g] adjudged, That an Indictment for traiterously coining *Alkemy* like to the King's Money, without shewing what Money, is insufficient; of which this seems to be the plainest Reason, That it appears not whether it were made like to the King's gold or silver Coin, or only like to that in Brass or Copper, *&c.* and if it were made like to that of the latter Kind only, it [h] seems that the Offence could not amount to Treason. Also it [i] seems, That an Indictment of Perjury, not shewing in what Manner and in what Court the false Oath was taken, is insufficient, because for what appears it might have been extrajudicial, *&c.* Also it seems clear, That it is necessary both in Indictments and [k] Appeals of Maihem and Murder, to set forth particularly in what Manner the Hurt was given, and that an Omission thereof is not holpen by a general Conclusion, that the Defendant *sic felonicè Mayhemiavit* or *Murdravit, &c.* But having already shewn in the Chapter of Appeals, with what Certainty the Count in an Appeal of Death, must set forth the special Manner of the Fact, as by shewing in what [l] Part of the Body the Wound was given, and the [m] Length and Breadth of such Wound; and [n] that the Party died of it; and with what [o] Weapon it was given; and that the Word [p] *Percussit* cannot safely be omitted where the Truth of the Fact will bear it, I shall refer the Reader to the said Chapter of Appeals, for the Learning relating to these Points. It hath been [q] adjudged, That an Indictment of Extortion charging *J. S.* with the Taking of 50*s.* as Bailiff of an Hundred, *colore officii*, without shewing for what he took it, is good at least after Verdict, for perhaps he might claim it generally as being due to him as Bailiff, in which Case the Taking could not be otherwise expressed. But this seems to be a special Case.

Sect. 60. Fourthly, That an Indictment charging a Man disjunctively is void, as where it finds that A. *Murdravit* B. *vel Murdrari causavit*, or that A. *Verberavit* B. *vel Verberari causavit*; or that A. [r] *Fabricavit talem cartam vel fabricari causavit*, for here are distinct Offences, and it appears not of which of them the Indictors have accused the Defendant.

[a] Supra Ch. 23. Sect. 79. Letter K.
[b] Cro. El. 147. pl. 11. 201. pl. 30. 9 Ed. 4. 26.
[c] Bro. Indictment 7. 9 Ed. 4. 26.
[d] Aleyn 78, 79. 1 Mod. 24. 5 Mod. 96, 129.
[e] Supra Ch. 10. Sect. 46. Cro. El. 583. pl. 12. 2 Roll. Rep. 345. Palm. 368, 374.
[f] Fitz. Indictment 10. S. P. C. 95. Letter D H. P. C. 206. Vide 2 Roll. Rep. 12.
[g] Book 1. Ch. 17. Sect. 57.
[h] Cro. El. 137.
[i] Supra Ch. 23. Sect. 79. 2 Lev. 140, 141. Salk. 377. Kelynge 124.
[k] Supra Ch. 23. Sect. 80.
[l] Supra Ch. 23. Sect. 81.
[m] Supra Ch. 23. Sect. 82.
[n] Supra Ch. 23. Sect. 83.
[o] Supra Ch. 23. Sect. 84.
[p] Supra Ch. 23. Sect. 82.
[q] 1 Sid. 91.
[r] 5 Mod. 137, 138. 1 Salk. 371. pl. 8.

Sect 61. Fifthly, That [a] regularly every Indictment must either charge a Man with some particular Offence, or else with several of such Offences, particularly and certainly expressed, and not with being an Offender in general; for no one can well know what Defence to make to a Charge so uncertain, or to plead it either in Bar or Abatement of a subsequent Prosecution; neither can it appear that the Facts given in Evidence against a Defendant on such a general Accusation, are the same of which the Indictors have accused him; neither can it judicially appear to the Court, what Punishment is proper for an Offence so loosely expressed. And upon this Ground it hath been adjudged, That an Indictment is insufficient which only charges a Man in general, with having [b] spoken divers false and scandalous Words against *J. S.* being Mayor of such a Place; or with being a [c] common Defamer, Vexer, and Oppresser of many Men; or with being a common [d] Disturber of the Peace, and having stirred up divers Quarrels as well among his Neighbours as others of the King's Subjects at such a Place, to the great Loss and Disturbance of his Neighbours aforesaid, and other the King's Subjects, *&c.* or with being a [e] common Oppressor and Disturber of the Peace; or with having been and still continuing to be a Man of evil [f] Behaviour; or with being a [g] common Deceiver of the King's People; or with being a [h] common Publisher of the King's Secrets, and of his Own, and of divers other Persons impanelled together with him to inquire for the Body of the County of divers Felonies, against his Oath, *&c.* or with being a [i] common Forestaller; or with being a [k] common Thief; or with being a [l] common Evil-doer; or with being a common [m] Champertor; or with being a common [n] Conspirator, and such like. It is holden indeed in a Note in *Fitzherbert*'s *Abridgment*, That an Indictment for Confederacy in general is good, but this is made a Query by the Reporter of the [o] Year-Book, from which the said Note in *Fitzherbert* is taken, and is denied to be Law both by [p] *Brook* and [q] *Rolle*, nor do I any where find the least Reason offered to distinguish this from the other Cases above-mentioned. Also it is holden by Sir *Edward* [r] *Coke*, That the ancient Form of Indictments charging Men with having as Hereticks and Traitors, and Infesters of the Highways, conspired and confederated, *&c.* to destroy the Catholick Faith, and having daily published false and seditious Writings, *&c.* were utterly insufficient, and yet such Indictments seem to have been [s] frequent; as were also Indictments charging Men in general, as *Insidiatores viarum, & depopulatores agrorum*, which [t] Words took the Benefit of the Clergy from the Persons indicted, before the Statute of 4 *H.* 4. 2. by which it is enacted, That those Words shall no more be put into Indictments, nor if they be, shall have such Effect as to take from the Persons indicted the Benefit of the Clergy; [u] and this Statute in this Respect seems to be in Affirmance of the Common Law, which seems generally to disallow of such uncertain Indictments, as appears from the Reasons and Authorities above set forth. Yet it hath been adjudged, That a Man may be generally indicted as a common Barretor against the [x] Form of the Statute, and [y] against the Peace, without shewing any of the particular Facts in the Indictment, by which he appears to have been so; for Barretry is an Offence of a [z] complicated Nature, consisting in the Repetition of divers Acts in Disturbance of the common Peace, all of which it would be too prolix to enumerate in the Indictment; and therefore [aa] Experience hath settled it to be sufficient to charge a Man generally, as a common Barretor, (which is a [bb] Word of Art appropriated to this

[a] Vide 1 Lev. 203. 1 Keb. 278. Shower 389, 390.
[b] 1 Roll. Re. 79. 2 Roll. Ab. 79 pl. 11.
[c] 2 Roll. Ab. 79. pl. 1, 2. 1 Mod. 71.
[d] 2 Roll. Ab. 79. pl. 10.
[e] 1 Mod. 71. 288. 1 Lev. 299. Raym. 205. 1 Vent. 104.
[f] 2 Roll. Ab. 79. pl. 12.
[g] 6 Mod. 311.
[h] Moor 302. pl. 451.
[i] Fitz. Action sur le Stat. 26. 29 Ass. pl. 45. Moore 302. pl. 451.
[k] 2 Roll. Ab. 79. pl. 5. Moore 302. pl. 451. 22 Ass. pl. 73.
[l] 22 Ass. pl. 73.
[m] 29 Ass. pl. 45.
[n] 29 Ass. pl. 45.
[o] 22 Ass. pl. 45.
[p] Bro. Indictment 12.
[q] 2 Roll. Ab. 79 pl. 8.
[r] 3 Inst. 41
[s] 3 Inst. 41
[t] 11 Co. 29 a. H. P. C. 206.
[u] Vide 3 Inst. 41. Lambert, Book 4. Ch. 5. Fol. 404.
[x] Book 1. Ch. 81. Sect. 10.
[y] Cro. Jac. 527. 2 Roll. Ab. 82. pl. 5.
[z] Book 1. Ch. 81. 8 Co. 36. b. 37.
[aa] 2 Roll. Ab. 79 pl. 3. Cro. Jac 527. 2 Keb. 409. pl. 33.
[bb] Book 1. Ch 81. Sect 10. 2 Lev. 208.

this Purpoſe,) and before the Trial to give the Defendant a [a] Note of the particular Matters which you intend to prove againſt him. Alſo it is [b] holden, That there is no need to name any particular Place where the Defendant was a Barretor, becauſe he ſhall be ſuppoſed to have been guilty in divers Places, and the *Venire* is moſt proper from the Body of County. Alſo it is ſaid that there is no need in the Concluſion of ſuch an Indictment, to lay the Offence *ad nocumentum omnium ligeorum, &c.* but that [c] *Diverſorum* is ſufficient in ſuch an Indictment as well as in an Indictment of a common Scold, *&c.* becauſe it appears from the Nature of the Thing, that it could not but be a common Nuſance. Alſo it ſeems to be [d] agreed, That an Indictment againſt one as a common Scold, is good without ſetting out the Particulars, for the ſame Reaſons that ſuch Indictment of Barretry is good.

[a] Book 1. Ch. 81. Sect. 13.
[b] Vide B. 1. Ch. 81. Sect. 11.
[c] 2 Keb. 409. pl. 33. See Book 1. Ch. 75. Sect. 5.
[d] 6 Mod. 311. Book 1. Ch. 75. Sect. 5.

Sect. 62. Sixthly, That the Charge muſt be laid poſitively, and not by Way of [e] Recital, as with a *Quod cum, &c.* and that the Want of a direct Allegation of any Thing material in the Deſcription of the Subſtance, Nature, or Manner of the Crime, [f] cannot be ſupplied by any Intendment or Implication whatſoever: And upon this Ground it ſeems to be [g] generally holden, That an Indictment of Death having the Words *felonicè murdravit, &c.* cannot amount to an Indictment of Murder, without the Words *Ex malitia præcogitata*; and yet by the Word *Murdravit* it expreſsly charges the Party with Murder, and it is impoſſible that there could be a Murder, and no Malice prepenſe. Alſo it ſeems to be generally agreed, That no Indictment of Death can be good without an expreſs Allegation, that the Deceaſed both received the Hurt which is laid as the Cauſe of his Death, and alſo that he died of the Hurt ſo received; and that the Want thereof cannot be made good by any Implication whatſoever, as hath been more fully ſhewn, *Ch.* 23. *Sect*, 82, 83. Alſo it hath been [h] adjudged, That an Indictment againſt *J. S.* for felonioufly breaking ſuch a Priſon, and commanding *J. N.* who was therein impriſoned for Felony to eſcape, is not a good Indictment for a felonious Breaking, without expreſsly ſhewing that *J. S.* did eſcape; and yet the Breaking is expreſsly laid to be felonious, and it is impoſſible that it could be ſo unleſs the Party did eſcape. But it will be needleſs to enumerate any more Inſtances of this Kind, which are ſo very frequent, that there is ſcarce any Caſe which mentions Exceptions taken to Indictments, without having ſome or other grounded on this Rule, That in an Indictment nothing material ſhall be taken by Intendment or Implication. Yet the Law will not admit of too great a Nicety of this kind, for it hath been adjudged, That if in the firſt Part of an Indictment of Death, the Aſſault be laid with Malice prepenſe, *&c.* there is no [i] need to repeat it in the following Clauſe, which ſhews the giving of the Wound, being joined with a Copulative to the precedent Sentence, and laid at the ſame Time and Place with the Aſſault. Alſo it hath been [k] adjudged, that where an Indictment ſets forth, That *J. S.* was lawfully arreſted by Vertue of a Plaint before ſuch a Sheriff, *&c.* it ſhall be intended that there was a good Warrant. Alſo it hath been [l] adjudged, That where a Warrant is alledg'd, authorizing the Arreſt of *J. S.* within the Liberties of *London*, and the Indictment lays the Execution of it in ſuch a Pariſh and Ward in *London*, without expreſsly laying the Pariſh and Ward within the Liberties of *London*, yet the Indictment is good, for the Court will not admit of ſuch a ſtrained Exception, that a Pariſh in *London* may be out of the Liberties of *London*.

[e] Salk. 371. pl. 6.
[f] S. P. C. 96. Cro. Jac. 20. 4 Co. 42.
[g] 5 Co. 120. b. Dyer 99. pl. 63. & 65. H. P. C. 231. Vide 2 Lev. 140, 141. 4 Co. 41. b. Contra Dyer 68. pl. 28.
[h] Kellew. 87. Vide Supra Ch 18. Sect. 11.
[i] 4 Co. 41. b.
[k] Cro Jac. 473.
[l] 9 Co. 67. 5 Co. 120.

Sect.

[a] Cro. Jac. 610. 2 Mod. 128. 2 Roll. Rep. 226. Moore 606. 2 Lev. 229. contra 2 Roll. Rep. 226. Quære Ray. 378. 1 Keb. 852.

Sect. 63. Also it hath been [a] adjudged, That where an Indictment finds that *J. S. existens* of such or such a Degree or Trade, *&c.* as brings him within the Purview of the Law whereon the Indictment is founded, committed such a Fact, it shall be intended that he was of such Degree, *&c.* at the Time of the Fact, without any express Allegation to that Purpose, because that is the most natural Construction of the Participle *existens*, going before the Verb to which it is the nominative Case; [b] yet where an Indictment of Forcible Entry, finds that *A.* disseised *B.* of such Land *existens liberum tenementum* of *B.* it seems agreed, That the Indictment is insufficient, because it stands indifferent, according to the common Rules of Construction, whether the Land were the Freehold of *B.* at the Time of the Disseisin, or at the Time of the finding of the Indictment, the Word *existens* not being the nominative Case to the Verb, but applied to the Thing which was the Subject of the Action. But I cannot find any certain general Rule, whereby it may be known in what Cases an Exception of this kind shall be taken to be so over nice, that the Court will not regard it. All therefore that I shall add on this Head is this, That as on the one Hand the Law will not suffer a Man to be condemned of any Crime whereof the Jury have not expressly found him guilty, by any Argument or Implication from what they have so found; so on the other Hand it will not suffer a Criminal to escape on so trifling an Exception, which it would be absurd and ridiculous to take Notice of; for *nimia subtilitas in jure reprobatur*. But the Judgment hereof cannot but be in a great Measure left to the Discretion of the Judges, who from the Circumstances of each particular Case, the Comparison of Precedents, and the plain Reason of the Thing, seem always to have endeavoured to have gone within these Rules as nearly as possible.

[b] Book 1. Ch. 64. Sect. 38. Cro. Jac. 610. 2 Roll. Rep. 226. 2 Lev. 229. 2 Mod. 129.

Sect. 64. Eighthly, That it is a certain Rule, That where one material Part of an Indictment is repugnant to another, the Whole is void, for the Law will not admit of such Nonsense and Absurdities in legal Proceedings, which, if suffered, would soon introduce Barbarism and Confusion; also it takes off much from the Credit of an Indictment, that those by whom it is found have contradicted themselves. And upon this Ground it hath been adjudged, That if an Indictment [c] charge the Defendant with having forged a certain Writing by which *A.* was bound to *B.* which is impossible if the Writing were forged; or if an Indictment of Forcible Entry set forth, That the Defendant disseised *J. S.* of Lands, wherein it appears by the Indictment it self, that he had no Freehold whereof he could be disseised; or that the Defendant entred peaceably on *J. S.* and then and there Forcibly disseised him; or that he disseised him of Land then being and ever since continuing to be his Freehold; [d] every such Indictment is void, for its manifest Inconsistency and Repugnancy. And upon the like Reason it hath been adjudged, That an Indictment of Death, laying the Stroke at *A.* and the Death at *B.* or the Stroke on the first of *May*, and the Death on the Tenth, and then concluding that the Defendant in such Manner murdered the Party at *A.* aforesaid, or on the first of *May* aforesaid, is insufficient for the Repugnancy, as hath been more fully shewn in the [e] Chapter of Appeals, because it supposes the Murder to have been committed at a Place in the first Case, and on the Day in the second; in which it appears by the Indictment it self, That the Party was not killed but only wounded. Also it hath been [f] adjudged, That an Indictment for selling Iron with false Weights and Measures, is void, not only because it is absurd to suppose that Iron could be sold by

[c] 3 Mod. 104.

[d] See Book 1. Ch. 64. Sect. 39.

[e] Supra Ch. 23. Sect. 88, *and* 89.

[f] 2 Roll. Ab. 81. pl. 5.

by Measure, but also because it is repugnant and inconsistent that it should be so sold at the same Time when it was sold by Weight. Also if an Indictment at a Sessions holden the 13th of *January*, 30 *Car.* 2. find that the Defendant has been absent from Church six Months from the first of *January*, 30 *Car.* 2. it is [b] agreed, That it is void for the Impossibility, for there are but eleven Days between the 1st of *January*, and the holding of the Sessions. Also if an Indictment charge a Man with having feloniously done a Fact, which appears upon the Face of the Indictment to have been but a Trespass, as with feloniously cutting down and carrying away Trees, the Court will [c] not arraign him; yet where the Sense appears plain, the Court will often dispense with a small Impropriety in the Expression, as where one is indicted for having mowed *unam Acram fœni*, which is [d] said to be sufficient, and yet that which was mowed, could not at the Time of the Mowing be in Strictness called Hay, but Grass only.

[b] Raym. 434, Par. Case, 3 Keb. 655, pl. 8.
[c] 12 Ass pl. 32. Fitz. Coro. 171. Indictment 9 Bro. Coro. 76. Book 1. Ch. 33. Sect. 21.
[d] 2 Rol. A. 81. pl. 1. Parallel Cases. 2 Rol. Ab. 81 pl. 2, 3. Vide 18 Ass. pl. 15.

As to the second Particular, *viz.* In what Manner the Body of an Indictment at Common Law must set forth the Substance and Manner of the Fact, in relation to the Offence of the Accessory, I shall observe,

Sect. 65. First, That a Repugnancy in setting forth such Offence is equally fatal as in setting forth that of the Principal; and therefore if an Indictment of Death which lays the Stroke on one Day, and the Death on a subsequent one, charge the Accessories with having abetted the Fact, at the Time of the Felony and Murder only, it is insufficient, as hath been more fully shewn in the [e] Chapter of Appeals, because it appears by the Indictment it self, that the Time of the Death, and consequently of the Murder, was subsequent to that of the Stroke, and therefore it is repugnant to alledge that the Defendant abetted the Stroke by being present at the Time of the Death.

[e] Ch. 23. Sect. 88, 89. Supra Sect. 64.
[f] H. P. C. 265, 266. 9 Co 67. Plowd. Com. 97.

Sect. 66. Secondly, That where several are present, and abet a Fact, and one only actually does it, an [f] Indictment may, in the same Manner as an [g] Appeal, either lay it generally, as done by them all, or specially, as done only by the one, and abetted by the rest. But it hath been resolved, That if an Indictment barely charge a Man with having been present when a Murder was committed, it is [h] void, because a Man may be innocently present, and shall not be presumed to have been a Party, where no Circumstance is found that makes him so.

[g] Supra Ch. 23. Sect. 76.
[h] 14 H. 7. 31. pl. 7. Bro. Indictment 5.
[i] 30 H. 6. 2. pl. 10 Fitz. Indictment 13. S. P. C. 95. Letter B. H. P. C. 206.
[k] Cro El. 752. pl. 10. Hetley 53. 8 Ed. 4. 3 pl. 6. H. P. C. 206.

Sect. 67. Also it hath been [i] adjudged, that an Indictment of *J. S.* as accessory to four, by these Words, that *J. S. sciens ipsos quatuor homines feloniam prædictam feciſſe apud D. felonice receptavit*, is naught for not saying *eos receptavit*, for it doth not appear how many of them the Indictors have found him to have received, whether all four, or three, or two, or but one.

Sect. 68. It hath been [k] holden, That an Indictment charging a Constable with having voluntarily and feloniously suffered a Person arrested by him upon Suspicion of Felony to escape, without shewing what the Nature of the Felony was, and that it was actually committed, is void for the Uncertainty, not only because it appears not but that the Offence of which the Party was suspected, was never actually committed; in which Case the Escape could [l] not be criminal; but also because it appears not what the Felony was, and unless the Arrest were for a Felony, the Escape could not be felonious. But it is said, That an Indictment for knowingly receiving Persons outlawed for, or convicted of Felony, or for knowingly suffering such Persons to escape, [m] may be good, without shewing what the Felony was, or that it was actually committed, if

S. P. C. 95. Letter A. Fitz. Indictment 16. Vide Fitz. Coro. 55, 76.
[l] Supra Ch. 12. Sect. 16, 17. Ch. 18. Sect. 7. Ch. 19. Sect. 2, 3.
[m] 8 Ed. 4. 3. pl. 6. Fitz. Indictment 16. *Quare* Keilw. 194. a.

the Record of the Outlawry or Conviction be ſet forth with convenient Certainty: And the moſt plauſible Reaſon of this Opinion ſeems to be this, That it may be ſufficiently made out by ſuch Record, of what Kind the Felony was, and alſo that it was actually committed, *&c.* It is holden indeed by Sir *William* [a] *Staundforde*, That ſuch a general Indictment for receiving a Perſon outlawed for Felony in the ſame County wherein he dwells is good, but not if it were in another, becauſe a Man is bound at his Peril to take Conuſance of an Attainder of Felony in his own County, but not in another. But I much queſtion the Authority of this Diſtinction, ſince, as the Law ſeems now to be [b] holden, a Man is no more bound to take Conuſance of ſuch an Attainder in his own County, than in any other.

[a] S. P. C. 95. Letter G. Vide Fitz. Coro. 377. Dyer 355. pl. 36. [b] H.P.C.218. [c] 7 H.6. 42.b. Bro. Indictment 4. Fitz. Indictment 11. 3 Keb. 760. pl. 45.

Sect. 69. It hath been [c] holden, That an Indictment finding that *J. S. ſcienter receptavit* ſuch a one, being a Felon, is not good, for this Reaſon among others, becauſe it doth not expreſsly find, that *J. S.* knew the Perſon ſo received by him to have been a Felon. But this is contradicted by other [d] Authorities, by which it is holden, that the Word *ſcienter* in ſuch a Caſe ſhall be conſtrued to go thro' the whole Sentence.

S. P. C. 96. Letter G. [d] 2 Lev. 208. 8 Ed. 4. 3 pl. 6. 1 Danv. Abridg. 19 pl. Letter H. [e] 2 R. A. 79 L. [f] 1 H. 5. 5. pl. 8.

As to the ſecond Point, *viz.* In what manner the Body of an Indictment at Common Law muſt deſcribe the Perſons mentioned in it, I ſhall endeavour to ſhew,

H. P. C. 243. S. P. C. 181. Letter D. Fitz. Miſnoſmer 9. Vide 3 H. 6. 25, 26. Theloal. lib. 11. cap. 5. Sect. 14.

1. In what manner it muſt deſcribe the Defendant.
2. How other Perſons mention'd or referr'd to in the Indictment.

Sect. 70. As to the firſt Particular, it is ſaid, That an Indictment that the King's Highway in ſuch a Place is in Decay, thro' the Default of the Inhabitants of ſuch a Town, is [e] good wirhout naming any Perſon in certain: Alſo it is ſaid, [f] That no Indictee can take any Advantage of a miſtaken Surname in the Indictment, either by Plea in Abatement, or otherwiſe, notwithſtanding ſuch Surname have no manner of Affinity with his true one, and he was [g] never known by it; and in this Reſpect, an Indictment differs from an Appeal, whereof it is [h] certain that a Miſnoſmer of a Surname may be pleaded in Abatement, as well as any other Miſnoſmer whatſoever.

[g] *Quære* Kelyng 11, 12. [h] 1 H. 5. 5. pl 8. Raſtal's Entries, 50. pl. 10, 54. pl 4. H. P. C. 243. S P. C. 181. Letter D. Supra ch. 23. Sect. 102. [i] Theloal. lib. 11. ch. 5. Sect. 12. 11 H. 4. 41. pl. 7. Fitz. coro. 88. Miſnoſmer 18. H. P. C. 243. contra 3 H. 6. 26. a. Bromiſnoſmer 6. [k] Cro. ca 371. 1 Jon. 346. [l] 2 Leon. 248, 249. *Quære* Cro. El. 542. pl. 8. [m] Vide ſupra ch. 23. Sect 102, 103 Shower 392, 393. [n] Vide ch. 23. S 103. Keilw. 25 b. 26 a. *Quære* Palm. 195.

Sect. 71. But I do not find but that every other Miſnoſmer of the Defendant, except that of the Surname, and alſo every defective Addition, are as fatal in an Indictment as an Appeal; for it ſeems generally to be [i] holden that a Miſnoſmer of the Defendant's Name of Baptiſm may be pleaded in Abatement of an Indictment. Alſo it hath been [k] adjudged to be a good Plea in Abatement of an Indictment againſt one by the Name of Sir *J. S.* Knight, that he is a Baronet, and no Knight. Alſo it hath been [l] holden, that it is a good Plea in Abatement of an Indictment againſt Garter King at Arms, that he is not called Garter in the Indictment, becauſe it is a Name of Dignity, being given him by the Words *creamus*, *coronamus*, and *nomen imponimus*; and from the Reaſon of this Caſe, it ſeems plainly to follow, that the Omiſſion of any other Name of [m] Dignity may be pleaded in Abatement of an Indictment: [n] And if ſo, why ſhould not the Omiſſion of the Defendant's Name of Baptiſm be equally fatal?

Sect. 72. It ſeems to be agreed, that notwithſtanding an Indictment be the Suit of the King, yet being within the expreſs Letter of the Statute of 1 *H.* 5. 5. concerning Additions, ſet forth more at large in the Chapter of

of [a] Appeals, it [b] cannot be conſtrued to be out of the Meaning of it. From whence it follows, that the Want of a ſufficient Addition, within that Statute is as good an [c] Exception to an Indictment, if [d] Proceſs of Outlawry lie on it, as it is to an Appeal. Alſo it hath been adjudged, that it is a [e] fatal Fault to apply ſuch Addition to the Name which comes under the *Alias dictus* only, and not to the firſt Name: But it is ſaid not to be material [f] whether any Addition be put to the Name which comes under the *Alias dictus* or not, becauſe what is ſo expreſs'd is not material. But it is ſo great a Fault to put no Addition to the firſt Name, that where ſeveral are indicted, ſuch an Omiſſion, in Reſpect of one of them, makes the Indictment [g] vicious as to all. And it may be probably argued, that there is the ſame Reaſon for the like Fault in an Appeal againſt divers, to abate it alſo as to all, but I do not find this Point [h] expreſsly agreed. But it ſeems clear, that generally the Law is the ſame in relation to Additions in Indictments and Appeals. Having therefore already treated in the Chapter of Appeals of the general Learning relating to this Subject, and ſhewn that an Addition in [i] *Engliſh* is as good as in *Latin*; and that where ſeveral Defendants have the ſame Addition, it is [k] ſafeſt to repeat it after each of their Names; and that the Son being of the ſame Name and Addition with the Father, ought to be diſtinguiſhed with ſome [l] farther Deſcription; and having alſo ſhewn what is a ſufficient Addition of the [m] Eſtate, or Degree, or [n] Myſtery, and alſo of the [o] Town, Hamlet, Place, and County, of the Defendant: And alſo how the Defect of an Addition may be [p] ſalved by the Appearance and Plea of the Defendant, I ſhall refer the Reader fot all theſe Particulars to the Chapter of Appeals.

Sect. 73. As to the ſecond Particular, *viz.* In what manner the Body of an Indictment at Common Law muſt deſcribe the other Perſons beſides the Defendant mentioned or referred to in it: It is certainly ſafeſt to deſcribe them with convenient Certainty, which will hardly be diſpenſed with, except in ſpecial Caſes, and for ſpecial Reaſons. For thoſe general Indictments which [q] anciently ſeem to have been allowed for ſuffering divers Bakers to bake, *&c.* againſt the Aſſiſe, *&c.* nor for diſtraining divers Perſons without Cauſe, *&c.* have by the later [r] Authorities been holden inſufficient for their Uncertainty in not naming ſome Perſons in particular who were ſo ſuffered to bake, or diſtrained, without which the Court cannot ſo well know what Fine will be proper; nor can the Defendant be ſo well enabled to make his Defence, nor to plead the Indictment to a ſubſequent Proſecution. And for the ſame Reaſons among others, an [s] Indictment for taking divers Sums of divers Perſons for ſuch a Toll at ſuch a Rate, without naming any Perſons in particular, hath been adjudged naught. Yet where in common Preſumption it may be very difficult, if not impoſſible, to know the Names of the Perſons referred to in an Indictment, it [t] may be good without naming any of them; [u] as where one is indicted for having knowingly received and harboured divers Thieves, to the Jurors unknown; in which Caſe, ſuch a general Charge is maintainable from the Neceſſity of the Thing, for otherwiſe a notorious Offender of this Kind, might be wholly diſpuniſhable, for want of the Jurors knowing the Names of the Perſons ſo received, and yet might be publickly known to carry on ſuch a Practice, to the common Nuſance of the Country, in which Reſpect it cannot but be reaſonable in ſuch a Caſe to puniſh him, tho' not as an Acceſſory to the Thieves, without ſhewing that he had received ſome of them in particular. And for the like Reaſon, if

[a] Supra ch. 23 Sect. 104
[b] Bro. Addition 50. Long quinto Ed. 4. 33, 34. Finch 234.
[c] Bro. Additions, 23, 41. 2 Leon. 183. Shower 392, 393.
[d] Cro. El. 32. pl 9 148 pl. 6 Cro. Ja. 531.
[e] S. P. C. 68. 2 Leon 183. 30 H. 6. pl. 2. Cro. El. 583. pl. 12. Vide Dy. 88. pl. 107. 1 Ed. 4. 1. pl. 3.
[f] 30 H. 6. pl. 2. S. P. C. 68 Fitz. Proceſs 103. 1 Ed. 4. 1 pl. 3.
[g] 1 Bulſ. 183.
[h] Vide ſupra ch. 23. Sect. 125. Fitz. Count 18.
[i] Supra, ch. 23. Sect 105.
[k] Supra, ch. 23. Sect. 105.
[l] Supra, ch. 23. Sect. 105.
[m] Supra, ch. 23 Sect. 106, 107, 108, 109, 110, 111.
[n] Supra, ch. 23. Sect. 112, 113, 114, 115. 116, 117.
[o] Supra, ch. 23. Sect. 117, 118, 119, 120, 121, 122.
[p] Supra, ch. 23. Sect. 123.
[q] 38 Aſſ. pl. 11, 12. Bro. Preſentment 27.
[r] Bro. Indictment 21. 2 Rol. Ab. 80. pl. 1, 2.
[s] Shower 389, 390.
[t] Pl. Com. 85. b. 129 a.
[u] 2 Lev. 208.

[a] 1 Ed. 3. 20. pl. 26. 1 Aſſ. pl. 7. Fitz. coro. 159. 23 Aſſ 94. Fitz. Indictment 10. S. P. C. 95. Letter G. Pl.Com.85.b. 129. a. 9 H.6. 45. b. Dyer 99. pl. 61.285.pl.38. VideFitz.coro 146, 183. Noy 85. Supra, ch.23. Sect. 78. [b] Fitz. Indictm. 12.17. 9 Ed. 4. b. S. P. C. 95. Letter G. Dyer 99. pl. 61. Keilw. 25. Supra, ch.23. Sect. 78. Bro. Indictment 11. Pl. Com. 85. b. 129 a. 18 Aſſ. 15. *ſeems contrary.* [c] Fitz. Indictm. 9. 26. S. P. C. 95. Letter G. contra Fitz. Indictm. 27. Bro Indictment 20. 30 Aſſ. pl 37. [d] Keling. 10. [e] 7 Ed. 4. 14. pl. 1. Fitz. Indictment 15. S. P. C. 95. Letter [f] Lamb. B. 4. ch. 5. Dalt. ch. 131. S. P. C. 95. Letter G. [g] Cro.El.489, 490. [h] 1 Ed. 3. 20. pl. 26. 1 Aſſ pl. 7. Fitz. coro. 159, 183. Vide Bro. Indictment 10. [i] H.P.C 207. Dy. 285. pl 38 [k] S. P. C. 95. Letter G. Pl. Com. 85. b. 129. a. Keilw. 25. 9 H. 6. 45. b. Vide Dyer 99. pl. 61. Dalton ch. 131. [l] Fitz. Indictment 27. 30 Aſſ. pl. 37. 18 Aſſ. pl. 15. 2 Leon. 39. [m] Supra, ch. 23. Sect 78. [n] Keilw. 25. Dyer 285. pl. 38.

if a Stranger [a] unknown to the Country be found ſlain, or if the dead Body of a Perſon who was well known, be diſfigured in ſuch a Manner by its Wounds, that no one can diſcover whoſe it was, it is certain that an Indictment againſt the Offender, for having killed *quendam ignotum*, will be good. [b] And upon the ſame Ground, if a Stranger unknown to the Country be robbed, and will not come in to proſecute, nor diſcover his Name, it ſeems clear that an Indictment againſt the Offender for having robbed *quendam ignotum* is good. And if Goods be found upon one notoriouſly ſuſpected of Felony, of which he can give no manner of Account, as where a Highwayman is apprehended with his Pockets full of Watches and Rings, it ſeems that he may either be indicted for ſtealing ſuch Watches and Rings, being the Goods *quorundam ignotorum*, or, as ſome [c] ſay, for ſtealing them generally. Alſo in the Indictment of the Regicides for the Murder of King *Charles* I. it was [d] agreed that the Fact was well laid, as done *per quendam ignotum*, with a Vizor on his Face. And if one ſteal the Goods of an Abbey, *&c.* during a Vacancy, he may be indicted for ſtealing [e] *Bona Eccleſiæ*, and yet the Church can have no Property. But theſe ſeem to be ſpecial and extraordinary Caſes, depending on particular Reaſons, and grounded on manifeſt Neceſſity, without which, it ſeems that ſuch Indictments cannot be maintained: For it ſeems to be taken as a Ground in [f] many Books, that regularly the Perſons offended, as well as the Defendant, ought to be certainly deſcribed in every Indictment. And agreeably hereto it hath been [g] adjudged, That an Indictment for ſtealing *quandam peciam panni linei cujuſdam J. S.* without adding *de bonis & catallis ejuſdem J. S.* is inſufficient, becauſe it doth not expreſsly appear to whom the Goods ſtolen did belong. Alſo it was anciently [h] holden, That where one is indicted for the Death of a Perſon unknown, the Inqueſt ought to tell his Name to the Court; but ſurely this muſt be intended where they have ſome Means to know it. However, from the whole thus much ſeems plainly to follow, that where-ever the Perſon injured is known to the Jurors, his Name ought to be put into the Indictment. And therefore, as I take it, thoſe [i] Books which ſeem generally to allow of Indictments of killing, or robbing Perſons unknown, are to be underſtood with this Limitation, That ſuch Indictments are then good when the Party is in Truth unknown to the Jurors. And agreeably hereto, others [k] who ſpeak more fully of the Matter, ſeem plainly to go upon the Neceſſity of the ſeveral Caſes. And the Want of ſuch Neceſſity ſeems probably to have been the beſt Reaſon why Indictments not ſhewing to whom the Wrong was done, were diſallowed in ſome of the [l] old Books. However, it is certain that an Appeal for the Death or Robbery of a Perſon unknown, is in no Caſe good, as hath been more fully ſhewn in the [m] Chapter of Appeals.

Sect. 74. It hath been [n] adjudged, That an Indictment of an Aſſault on *John* Pariſh-Prieſt of *D.* in the County of *C.* is good, without mentioning his Surname, for if a wrongful Surname of the Defendant himſelf will not vitiate an Indictment, as hath been more fully ſhewn. *Sect.* 71, ſurely *a fortiori*, the Omiſſion of the Surname of any other Perſon will not vitiate it; eſpecially where ſuch Perſon is otherwiſe deſcribed with ſuch Certainty, that it is impoſſible to miſtake him for any other. But if an Indictment for a Wrong done to a Perſon well known deſcribe him only by his

his Name of Baptism, without some Addition to distinguish him from others of the same Name, it seems [o] questionable, Whether it be not insufficient for the Reasons given in the foregoing Section? It is [a] said, indeed, in a short Note of a Case in *Moore*'s Reports, That an Indictment against one *Cole*, *quod burglariter domum cujusdam Ricardi fregit*, was adjudged good, without the Surname; and it not being there mentioned, that there was any other Description of the Party but by his Name of Baptism, it may be argued that that alone is sufficient: But to this it may be answered, That the only Point taken Notice of as adjudged, is that the Surname is not necessary, and perhaps in the Record at large there might be some Addition: But granting that there was none, yet the Authority of this Case is the less to be regarded, because of the Books cited to support it [b] two seem to be directly against it; and the [c] third, which is most to the Purpose, only proves that an Indictment for stealing the Goods *cujusdam ignoti* is good, which seems by no means to come up to the Point in Question, as hath been more fully shewn in the precedent Section. Yet howsoever the Law may stand in relation to such an Uncertainty, it seems to be [d] agreed, That a Repugnancy or Absurdity in the Description of the Person injured will vitiate an Indictment, as where one is indicted for stealing *bona prædict. J. S.* where no *J. S.* was mentioned before, for tho' in Civil Actions, the Word *prædicit* hath been sometimes [e] rejected, as Surplus and void, where it could be referred to [f] no certain Antecedent, yet this may perhaps chiefly depend on the Statutes of *Jeofailes*, which in many Cases help Defects in Form in Civil Actions, but extend not to criminal Cases, wherein the greatest Exactness is required; and if an Award may be defeated by appointing a [g] Payment on a certain Day beforemention'd, where no such Day was mentioned before, it cannot well be imagined that the like Inconsistency will be less fatal in a criminal Proceeding.

Sect. 75. It hath been [h] adjudged not to be necessary in an Indictment of Death to alledge, that the Person killed was in the Peace of God, and of our Lord the King, *&c.* tho' such Words are commonly put into Indictments, for they are not of Substance, and perhaps the Truth might be that the Party was at the Time actually breaking the Peace.

Sect. 76. As to the third Point, *viz.* In what Manner the Body of an Indictment at Common Law must describe the Thing wherein the Offence was committed, it seems clear that no Indictment can be good which wants a convenient Certainty of this Kind: And therefore it is [i] said, That an Indictment for forging a Lease of certain Lands, without naming some one certain Parcel, is insufficient. Also it seems to be agreed, That an [k] Indictment for stealing *bona & catalla J. S.* without any farther Description of them is void for its Uncertainty, for the like Reasons for which Indictments charging a Man with being an Offender in general are void, as hath been more fully set forth in the sixty-first Section: And upon the like Ground it hath been [l] adjudged, that an Indictment for a Trespass in two Closes of Meadow or Pasture; or for diverting *quandam* [m] *Partem aquæ* running from such a Place to such a Place, without any farther Description; or for ingrossing [n] *magnam quantitatem straminis & fœni*, or [o] *diversos cumulos tritici*, without shewing how much of each; or for carrying away *duas* [p] *centenas casei*, without adding the Words *libras* or *uncias*, or some other Substantive to *centenas*; or for erecting several [q] Cottages *contra formam statuti*, without shewing how many, *&c.* are insufficient for their Uncertainty. As to the [r] Case of the King against *Wetwang*, wherein the Court disallowed an Exception to the Generality

[o] Vide Dalton ch. 131. Lambert, Book 4. ch. 5.
[a] Moore, 466. pl. 662.
[b] 18 Ass. pl. 15. Fitz. Indictment 27.
[c] 9 Ed 4. 1. b
[d] Lambert, Book 4. ch. 5. Folio 495. 9 Ed 4. 1. b. Fitz. Indictment 17. Bro. Indictment 6. S. P. C. 95 b. Vide Cro. Ca. 465.
[e] 3 Levinz. 436. Cro El. 709. pl. 31.
[f] Vide Cro. Ja. 549, 559. pl. 11. 585, 586 pl. 7. 618. pl. 8. Yelv. 76. 111. Cro. Eliz. 658. pl. 2.
[g] Cro. Ja. 149. pl. 8. 1 Rol. A. 254. pl. 15. 263. pl. 6. Yelv. 97, 98.
[h] 4 Co. 41. b.
[i] Hob. 272.
[k] Dalton, ch. 131, Lamb B. 4. ch. 5. Fo. 496.
[l] 2 Rol. Ab. 81. pl. 4. 5 Mod. 138. Dalt. ch. 131. Parallel Cases B. 1. ch. 64. Sect. 37.
[m] 2 Rol. Ab. 80 pl. 14. 2 Buls 119. Parallel Cases B. 1. ch. 76. Sect. 88.
[n] Cro. Ca. 380, 381. Vide 2 Bulst. 317. Shower 389, 390.
[o] 1 Rol. R. 134. 135.
[p] Cro El. 754.
[q] 2 Rol. A. 80 pl. 13.
[r] 2 Keb. 178. 1 Lev. 203.

of an Indictment for taking *quoſdam piſces*, without ſhewing how many, it may be anſwered, that this was contrary to the Opinion of Mr. Juſtice *Twiſden*, and was only the ſudden Opinion of two of the other Judges; neither does it appear that the Indictment was adjudged good, but only that the Court refuſed to quaſh it, and ordered the Defendant to plead to it. However, it ſeems clear from conſtant Experience, [a] That if an Indictment be uncertain as to ſome Particulars only, and certain as to the reſt, it is void only as to thoſe which are uncertainly expreſſed, and good for the Reſidue.

Sect. 77. If the Indictment be for a Larceny or Treſpaſs on a living thing, as an Ox, Sheep, or Horſe, *&c.* it ſeems to be holden by [b] *Lambard*, and [c] *Dalton*, that it is moſt proper to expreſs to whom the Property of it belonged, by calling it reſpectively the Ox, Sheep, or Horſe of the Party injured, without uſing the Words *bona* or *catalla*: But that it is improper to uſe theſe Words, where the thing taken was not a living Creature. Alſo it is holden by [d] *Lambard*, that it is proper to ſhew the Worth of all living things, and alſo of ſuch dead things as are ſold by Weight or Meaſure, by expreſſing that they are of ſuch a Price, and the Worth of other dead things, by expreſſing that they are of ſuch a Value; yet no Inſtance is produced where any Indictment has been diſallowed in either Caſe for a Variance from theſe Rules. And as to the firſt of them it is farther obſervable, that the [e] Precedents in *Crompton* of Indictments for Stealing of Horſes, and Oxen, expreſly alledge the Horſe and Ox ſtolen *de bonis & catallis cujuſdam J. S.* &c. Alſo an Appeal of ſtealing Sheep in [f] *Raſtal's Entries* expreſly alledges them *de bonis & catallis* of the Appellant. And as to the ſecond of the Rules abovementioned, it is obſervable, that the Directions in the [g] Regiſter concerning this Matter, which ſeem to be the chief Foundation of the ſaid Rule are thus expreſs'd, that in a Writ of Treſpaſs of immoveable Chattels, the Writ ſhall ſay, *Tants de chateux ad valentiam X. S.* But if it be brought of a moveable Chattel, it ſhall ſay, *precii X S.* and *non ad valentiam.* Yet it appears by the Regiſter it ſelf, that even in Writs of Treſpaſs concerning which theſe Directions are given, the Worth of the things taken away is ſometimes omitted for the [i] Whole, and ſometimes for [k] Part. And it is ſaid to have been [l] adjudged, That ſuch Writs are good notwithſtanding ſuch Omiſſions. Alſo where things moveable and immoveable are mentioned together in the ſame Writ the Worth of all of them together is ſometimes [m] expreſſed under the Words *ad valentiam*, &c. And ſometimes the Worth of moveable Chatels, as that of [n] Corn in a Granary, *&c.* of [o] Wine in a Veſſel, and of [p] Wool is expreſſed under the Words *ad valentiam*, From all which it ſeems to [q] appear, That the ſaid Directions are not neceſſary to be obſerved, even in Writs of Treſpaſs, concerning the Form whereof they are expreſly given, and that it is not material whether the Words *ad valentiam* or *precii* are uſed, or whether any Value be ſet on the things taken away or not. And if ſo, why ſhould it be a greater Fault not to obſerve the ſaid Directions in Indictments, which are [r] not tied to the ſtrict Forms of Writs? Therefore from the whole, it ſeems [s] queſtionable, whether it be needful to ſet forth the Value of the Goods in an Indictment of Treſpaſs for any other Purpoſe than to aggravate the Fine, and whether it be neceſſary in an Indictment of Larceny for any other purpoſe than to ſhew

[a] Vide Poph. c. 208.
[b] Lambard, B. 4. Ch. 5. fol. 196.
[c] Dalt. Ch. 131.
[d] Lambard, B. 4. Ch. 5. fo. 497, 498. Vide Cro. Ja. 130.
[e] Crompton de pace, 247, 248.
[f] Raſt. Entr. 55. pl. 6.
[g] Regiſter, 93. b.
[i] Vide Regiſter, 93. b. *in the Writ* de warrena fugata, &c. *and that* de par co fracto. *and* 94 a. *in the Writ* de equo & catallis arreſtatis, 94. b. *in the Writ* de averiis imparcatis, &c. *and in that* de trang eſſione facta uxori, &c *and* 96 b. *in that* de equo percuſſo & 97 a. *in that* de ovibus fugatis, &c.
[k] Regiſt 93 b. *in the Writ* de clauſo fracto arboribus ſuccisis 94. b. *in the Writ* de domo fracta, &c. *and in the Writ* de Jumento, &c. fugatis. *and in that* de equis imparcatis, *and* 95. b. *in that* de palis, &c. *and in that* de piſcaria piſcata, &c. *and in that* de domo fracta, &c.

and 96. a. *in that* de ovibus tonſis, &c. & 96. b. *in that* de warrena fugata, &c. & 97. a. *in that* de porcis fugatis, &c, [l] Regiſter, 97. b. Vide Cro. Ja. 130. 1 Sid. 39, 150. [m] r Regiſter 94. a. *in the Writ* de piſcaria piſcata, &c. *and* 95. b. *in that* de piſcata piſcata, &c *and in that* de domo fracta, &c. & 96 de excluſis ſtagni. [n] Regiſter 95. b. *in the Writ* de bladis inundatis, &c. & 96. a. *in that* de clauſo fracto, &c. [o] Regiſter 95. b. *in the Writ* de vino, &c. [p] Regiſter 96. *and in the Writ* de ovibus tonſis, &c. [q] Vide ſ. n. b. 88 *Letter* m. Cro Ja. 130. 1 Sid. 39, 150, 121, 15. [r] q. Dy. 4. 26. b. [s] See Dalton, Ch. 131. Lambard, B. 4. Ch. 5. fol. 496, 497.

ſhew that the Crime amounts to grand Larceny, and to aſcertain the Goods thereby the better to intitle the Proſecutor to a [a] Reſtitution.

As to the fourth Point, *viz.* in what manner the Body of an Indictment at Common Law muſt ſet forth the Circumſtances of Time and Place, I ſhall endeavour to ſhew,

1. How it ought to ſet forth the Circumſtance of Time.
2. How that of Place.

Sect. 78. And firſt as to the Circumſtance of Time. I find it no where holden, That it is neceſſary to mention the Hour in an Indictment. But on the contrary, it is ſaid, [b] That if there be any Neceſſity for it in an Appeal, which yet is [c] queſtionable, it is from the Statute of *Glouceſter*, and not from the common Law; and therefore I ſhall take it for granted, That it is not neceſſarily required in an Indictment; ſince it is certain, That there is no Statute that makes it ſo, and the Common Law ſeems to have required no greater Certainty in an Indictment than in an Appeal.

Sect. 79. But it is laid down as an undoubted Principle in all the Books [d] that treat of this Matter, That no Indictment whatſoever can be good, without preciſely ſhewing a certain Year and Day of the material Facts alledged in it. Alſo it hath been [e] adjudged, That the Sheriffs Return of a Reſcous, without ſhewing the Year and Day, are inſufficient; becauſe ſuch a Return is in Lieu of an Indictment. Alſo it is taken for granted in [f] *Dyer*, That an Indictment of Reſcous is not good, without expreſly ſhewing the Day and Year both of the Arreſt, and alſo of the Reſcous, and that the Time of the latter is not ſufficiently ſhewn, by [g] ſhewing that of the former. And where an Indictment of Reſcous ſet forth, That J. S. committed ſuch a Felony ſuch a Day, and Year, and Place, *per quod* A. B. *prædictum* J. S. *cepit & arreſtavit, & in ſalva cuſtodia ſua adtunc & ibidem eundem* J. S. *habuit & cuſtodivit*, it is made a [h] Query, Whether the Indictment be not inſufficient, becauſe no Time of the Arreſt is alledg'd in the ſame Sentence with it; and it is doubtful whether the Time of the Cuſtody which is alledged in the next Sentence, by Force of the Copulative be applied alſo to the Arreſt or not, and *Dyer* ſeems rather to incline to the contrary Opinion. However, it is certain, That if an Indictment lay the Offence on an [i] uncertain or impoſſible Day, as where it lays it on a [k] future Day, or lays one and the ſame Offence at [l] different Days, or lays it on a Day which makes the Indictment [m] repugnant to it ſelf, it is void. Alſo it hath been adjudged, That no [n] Defect of this kind can be help'd by the Verdict. Alſo it is ſaid, That an Indictment of Death laying an Aſſault at a certain Time and Place is [o] not ſufficient without repeating the Time and Place in the Clauſe of the Stroke, and the like Rule ſeems alſo to hold as to Indictments of other Felonies, in which reſpect ſuch Indictments differ from Indictments of Treſpaſs. Alſo it is [p] certain, That an Indictment of Death ought as well to ſet forth the Year and Day of the Death as of the Stroke, that it may appear that the Party died within the Year and Day. But theſe Matters having been more fully conſidered in the Chapter of Appeals, I ſhall refer the Reader thither for the better underſtanding of them.

Sect. 80. It ſeems to be [q] generally agreed, That the Words *adtunc & ibidem* in the ſubſequent Clauſes of an Indictment are of the ſame Effect as if the Year and Day mentioned in the former Part of it had been expreſly

[a] Supra, Ch. 23. Sect. 55, 56, 57.
[b] S. P. C. 80.
[c] Supra, Ch. 23. Sect. 87. 1 Bulſt. 203.
[d] S. P. C. 95. Letter A. Lambard, B. 4. Ch. 5. Dalt. Ch. 138. Fitz Indict. 28. Dyer, 164. pl. 60. H. P. C. 206. 8 H. 5, 8. pl. 4.
[e] Fitz. Coro. 45. Attachm. 1. Bro. Return de brief. 971. 3 H. 7, 11. pl. 3.
[f] Dyer, 164. pl. 60. Vide Fitz Return de Viſcount, 32, Dy. 69 pl. 29. 10 Ed. 4, 15. pl. 13. Quære 5 H. 7, 17. b. 18. a.
[g] *Yet the contrary is adjudged*, 2 Bul. 208 Cro. Ja. 345.
[h] Dy. 164. pl. 60.
[i] Supra, Ch. 23. Sect. 88. Moor, 555. pl. 753.
[k] Raſtals Entries, 263 pl. 5.
[l] 2 H. 7. 7. pl. 22.
[m] Supra Sect. 64. & Ch. 23. Sect. 88, 89.
[n] 1 Rol. Ab. 781. N. 1.
[o] Supra, Ch. 23. Sect. 88. Hetley, 35. 119, 120. 5 H. 7, 17. b. 18. a.
[p] 1 Bulſt. 203, 204.
[q] Supra, Ch. 23. Sect. 90. Dy. 28. pl. 6. Vide Keilw. 100. ſupra Ch. 23. Sect. 88. 4 Co. 41 b. Quære Dyer 164. pl. 60.

[a] 7 H. 6. 39. pl. 4. Fitz. error. 17. Plow. Com. 122. b. [b] Lamb. B 4. Ch. 5. fol. 491. [c] Lamb. B. 4. Ch 5. fol. 493. [d] Book 1. Ch. 10. Sect. 5. Lamb B. 4. Ch. 5. fol. 492.

presly repeated. Also it hath been [a] adjudged, That an Indictment laying the Offence on the *Thursday* after the Day of *Pentecost* in such a Year is good: And from the like Ground it seems to follow, That an Indictment laying it on the [b] *Utas* of *Easter*, *&c.* (which shall be taken for the very Eighth Day after the Feast,) or on the Tenth of *March* [c] last (if it may be ascertained by the Style of the Sessions before which the Indictment was taken) is as good as if it had shewn the Day and Year by expresly naming such a Day of such a Month, *&c*,

Sect. 81. And where an Indictment charges a Man with a bare Omission as the not scowring such a Ditch, *&c*, it is [d] said, That it needs not shew any Time.

[e] Supra, Ch. 23. Sect. 90. [f] Lev. 113. 1 Salk, 195. [f] Keling. 11.

Sect. 82. It is most [e] regular to set forth the Year by shewing the Year of the King, yet this may be dispensed with for special Reasons, if the very Year be otherwise sufficiently expressed, for that only is material; and therefore in the [f] Case of the Regicides no Year of any King was laid for the King's Murder, but the compassing of his Death was laid in the Twenty fourth Year of King *Charles* the first, and the Murder was laid on the Thirtieth Day *ejusdem mensis Januarii*, because if the Reign of either King had been expressed, it might have caused a Dispute Whether that of the other would not have been more proper.

[g] Supra, Ch. 23. Sect. 87, 88. 91. 3 Inst. 230.

Sect. 83. It is [g] agreed, That a Mistake in not laying an Offence on the very same Day on which it is afterwards proved upon the Trial, is not material upon Evidence.

[h] Rex, v. Dixon. Trin. 2 Georg. Vide Supra, Sect. 76. [i] Shower, 389, 390. [k] Dom Reg. versus Simpson adjudged, Trin. 13. Annæ. [l] 25 Ed. 3. 43 pl 36 Fitz. Indictment 1. Suggestion 7. 4 H. 7, 8. pl. 7. Kelw. 98. pl. 1. 1 Bulst. 124. *See the Books cited Sect.* 72. *under the Letters* d, e, f, g, h. [m] Vide Keil. 33. pl. 6, 89 pl. 9 Cro. El. 448. [n] Vide Supr. Sect. 64 & 79. & Ch. 23.

Sect. 84. If an Indictment charge a Man with having done such a Nusance such a Day and Year, *&c.* and on divers other days, it is void as to the Facts on those days which are uncertainly alledged, and effectual for the Nusance on the Day specified; but if it charge a Man generally with several Offences at several Times, without laying any one of them on a certain Day, [i] as with extorting divers Sums of divers Subjects for a Passage over such a Ferry, *&c.* between such a Day and such a Day, it hath been adjudg'd That it is wholly void. Yet it hath been solemnly resolved, That a Conviction of [k] Deer-stealing setting forth the Offence between the Eighth and Twelfth of *July*, *&c.* is sufficient.

Sect. 85. As to the second Particular, *viz.* How an Indictment at Common Law must shew the Place where the Offence was done, it seems agreed by all the [l] Books, That no Indictment can be good without expresly shewing some Place wherein the Offence was committed; which must [m] appear to have been within the Jurisdiction of the Court in which the Indictment is taken, and must also be alledg'd in such a Manner as is perfectly free from all [n] Repugnance and Inconsistency, for if one and the same Offence be laid at two [o] different Places, or at the Town of *B.* [p] aforesaid, where no such Town was mentioned before; or if in an Indictment of Murder, the Stroke be laid at *A.* and the Death at *B.* and then it is [q] concluded that the Defendant *Sic felonicè murdravit* the Person deceased at *A.* the Indictment is void. And so is it also if it do [r] not lay a Place both of the Stroke and Death; or if the Place or Places so alledg'd, be not such from whence a [s] Visne may come, Yet it hath been adjudged, That a Fact laid in a Parish in *London*, with some other Addition, as in the Parish St. [t] *Michael* in *Woodstreet*, *London*, or in the Parish of St. [u] *Lowrence Jewry*, is good, without shewing the Ward in which

[o] 2 H. 7 7 pl. 22. [p] Cro. Ca. 465. Vide Supra, Sect. 74. [q] *See* Ch. 23. Sect. 88, 89, 91. [r] Supra, Ch. 23. Sect. 92.. Hetley, 35. 118, 119. Dyer 68. pl. 28 [s] Supra, Ch. 23. Sect. 92, 93. [t] 9 Co. 66. b. contra Cro. El. 732. Supra, Ch. 23. Sect. 92, [u] 7 H. 6. 36. pl. 42.

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the Pariſh lies. But theſe Matters having been more fully treated of in the [a] Chapter of Appeals, and alſo in the foregoing part of this [b] Chapter, relating to the Certainty of the Time of the Offence, I ſhall refer the Reader thither for the fuller Conſideration of them,

[a] Ch. 23. Sect. 88, 89, 91, 92. & 92

[b] Supra, Sect. 78, 79, 80.

Sect. 86. It ſeems, that there is no need in an Indictment on a Statute, ſetting forth the Deſcriptions which bring the Defendant within the Purview of it, to ſet forth any Place where thoſe Things happened, which brought him within ſuch Deſcriptions; and therefore where a Statute makes it High Treaſon for a Perſon born within the Realm, and in Popiſh Orders, to come into, or remain in the Kingdom, *&c.* there is no need in an [c] Indictment on ſuch Statute to ſhew in what Place the Defendant was born or ordained. Alſo it ſeems to be [d] agreed, That a Miſtake of the Place in which an Offence is laid will not be material upon the Evidence on not guilty pleaded, if the Fact be proved at ſome other Place in the ſame County. But if there be no ſuch Place in a County as that wherein an Offence is laid in an Appeal or Indictment, all Proceſs on ſuch Indictment or Appeal is made void by the Statutes of 7 *H.* 5. and 9 *H.* 5. 1. and 18 *H.* 6. 12. By the laſt of which Statutes it is recited, *That in the Parliament holden in the ninth Year of* H. 5. *it was ordained, For that many People of Malice cauſe often the King's liege People to be appealed or indicted in diverſe Counties of Treaſons or of Felonies, ſuppoſing by the ſaid Indictments or Appeals, that the ſaid Treaſons or Felonies were done in a certain Place in ſuch a County,* &c. *where no ſuch Place is in the ſame County, that the Proceſs of the ſame ſhall be void; and that the Indictors, Procurators, and Conſpirators ſhall be puniſhed by Fine,* &c. *by the Diſcretion of the Juſtices, and alſo liable to Writs of Conſpiracy, and by the preſent Statute the above recited Statute is made perpetual.*

[c] Poph. 93, 94. B. 1. Ch. 17 Sect. 79, 80, 81, 82.

[d] Vide Supr. Sect. 83. & Ch. 23. Sect. 91. Kelynge, 15. Salk 288. H. P. C. 264, 165.

87. It is obſervable, That the Statute made in the ninth Year of *H.* 5. herein referred to, ſeems to be wholly omitted by *Keble* and *Pulton*, who have no other Statute concerning this Matter made in the ninth Year of *Henry* V. excepting the firſt, which only confirms a Statute made in the ſeventh Year of the ſame King concerning Appeals and Indictments; and there is no other Statute whatſoever in the ſeventh Year of that King mentioned in *Keble* or *Pulton*, but only one which requires the Juſtices before the Award of any Exigent to inquire by Inqueſt of Office, Whether there be any ſuch Place in the County as that wherein an Offence is laid in an Appeal or Indictment. But this Statute ſeems only to extend to the County of *Lancaſter*, for it is directed to the Chancellor of that County, and recites, That Perſons had been indicted and appealed in Places falſly alledg'd in the ſaid County, and in the enacting Part ſpeaks only of Juſtices who had Power to determine Felonies in the ſaid County, and in the latter Part expreſly commands the ſaid Chancellor to cauſe it to be proclaimed in the ſame County, but mentions no other, From all which I ſee not how it can extend to any other County, and yet *Wingate* in his [e] Abridgment makes it equally extend to all Counties. However, [f] *Raſtal* in his Collection of Statutes ſeems to have ſet down the very Statute which is referred to by the above recited Statute of 18 *H.* 6. 12. and this is certainly [g] ſtill in Force.

[e] Wingate's Abridgm. of the Statutes under the Title of Conſpiracy, Sect. 3.

[f] Raſtal's Statutes, Conſp. 3.

[g] Lamb. B. 4. Ch. 5. fol. 493. F. n. b. 115. G.

As to the fifth Point, *viz.* Where the Body of an Indictment may be vitiated by falſe or improper *Latin*, or the Uſe of *Engliſh* inſtead of *Latin*, I ſhall endeavour to ſhew,

1. Where falſe *Latin* will vitiate an Indictment.
2. Where a Word which is not *Latin*.
3. Where ſuch Faults are holpen by an *Anglicè*.

Sect. 88. As to the firſt of theſe Particulars, it ſeems to be holden generally in ſome [a] Books, that no falſe *Latin* will vitiate an Indictment, and it ſeems to be holden by my Lord [b] *Coke*, That an Indictment ſhall not be quaſh'd for any falſe Concord between the Subſtantive and Adjective, as *præfatæ Regi*, or *præfatò Reginæ*, becauſe tho' the Expreſſions be incongruous, yet they are *Latin* and ſignificant; neither do I find this Opinion denied by any other Authority, and therefore I leave to be conſidered, Whether it may not ſtill be maintained, eſpecially [c] conſidering, That the Senſe appears as fully, clearly, and expreſſly from ſuch *Latin* as if it had been never ſo properly expreſſed. And it ſeems alſo, That the like Reaſon may be given for the Caſe in [d] *Yelverton*, wherein an Indictment of forcible Entry, finding that the defendant *unum meſuagium ingreſſum fecit*, without adding the Word *in* before *meſuagium*, was adjudged good; but it is ſaid in the Book, That this is not falſe, tho' it be not fine *Latin*; by which it ſeems to be implied, That if it had been falſe *Latin*, it might have vitiated the Indictment. However, it ſeems to be ſettled at this day, That an Indictment againſt two or more, laying the Fact charged againſt them in the ſingular Number, is inſufficient, as where it finds That *A.* and *B.* *inſultum* [e] *fecit*; the Reaſon whereof perhaps may be this, That it appears ſomewhat doubtful upon the Face of the Indictment whether the Jurors intended to charge more than one, becauſe the Fact is laid in the ſingular Number, which it ſeems abſurd to apply to more than one, and therefore the Indictment is inſufficient for its Uncertainty. As to [f] *Fulwood's* Caſe, wherein *Croke* reports the contrary to have been reſolved, it is certain, That the Verb in the Record is in the plural Number. And as to the [g] Caſes wherein Faults of this kind have been amended in original Writs, as *teneat conventionem* for *teneant*, and ſuch like; it may be anſwered, That thoſe Amendments were made by Vertue of the Statutes of [h] Amendments, which extend not to criminal Proceedings. And as to the Caſe in [i] *Bulſtrode's* Reports, wherein it is ſaid to have been reſolved, That an Indictment of Felony againſt more than one in the ſingular Number was amended, and thereupon the Defendants were adjudged to be hanged, it may be anſwered, That it doth not appear in what Part of the Indictment the ſingular Number was put for the plural; neither is the ſaid Reſolution, in whatſoever Senſe it be taken, reconcileable with the later Authorities, as ſhall be more fully ſhewn under the twelfth Point. But it is [k] ſaid, That a Fault of this kind is made good by the Grand Jury's finding the Indictment *Billa vera* againſt one of the Defendants only; the Reaſon whereof perhaps may be this, That the Uncertainty of the Indictment is ſupplied by ſuch an Indorſement. But this ſeems contrary to the Authorities relating to this Matter cited in the ſecond Section. Alſo it hath been [l] adjudged, That where a Bill of Indictment lays the Fact in the plural Number againſt two, and it is found *Billa vera* as to one of them only, it is good; and yet the Verb in the plural Number in the Record muſt, after ſuch a finding, be applied only to one Perſon; but to this it may be anſwered, That here is no Uncertainty either in the Bill or Indorſement. Alſo it hath been [m] adjudged, That the Word *Solvet* inſtead of *Solvat*, is not fatal in a Judgment; but that a new one ſhall be given.

[a] 5 Cro. 121. 2. Cro. Ca. 465.
[b] 5 Co. 121. b. Vide Cro. El. 108. pl. 3.
[c] Vide Cro. El. 108 pl. 3.
[d] Yelv. 27, 28.
[e] Dominus Rex verſus Dobſon, Termino Hilarii, 3 Georgii, 2 Keb. 51. pl. 9. Vide Cro. Ca. 465, 573. Cro. El. 754. pl. 15.
[f] Cro. Ca. 489.
[g] 2 Vent. 173. Yelv. 224, 225. 2 Saund. 38. Cro. Ja. 306, 369.
[h] Salk. 51, 52. 6 Mod. 268.
[i] 2 Bulſt. 35.
[k] 2 Keb. 51. pl. 9.
[l] Cor. Ca. 464, 465.
[m] 1 Sid. 219.

Sect. 89. As to the second Particular, *viz.* Where the Use of a Word which is not *Latin* will vitiate an Indictment, it seems generally [a] agreed, That an Indictment wholly in *English* is void, which seems to depend upon the Statute of 36 *Ed.* 3. 15. *By which 'tis enacted, That all Pleas which be pleaded in any of the King's Courts shall be entred and enrolled in Latin.* And from hence it seems clearly to follow, That if any material Part either of the Body or Caption of an Indictment be expressed in a Word which is not *Latin*, as by the Word [b] *erectaverunt* instead of *erexerunt*, or [c] *brachia sua dextra*, instead of *brachio*, or [d] *præsentant' existit* instead of *præsentat'* the Indictment is insufficient; (except in some special Cases herein after set forth,) for no one can say, That the bare giving a *Latin* Termination to a Word unknown in that Language, can make it become *Latin*; and if the Want of one material Word may be supplied, why not the Want of two, and so on? It hath indeed been [e] holden, That a Fault of this kind, as *imaginavit* for *imaginatus est*, *avæ* for *aviæ* is amendable in an original Writ, which yet is denied by others, if it be in a [f] substantial Part. However, it seems certain, That such Amendment must depend upon the Statutes of Amendments, which extend [g] not to criminal Proceedings. Also it seems, That it is no less a Fault to make Use of a Word which is proper *Latin* in another Sense, whether entirely different, or of a much larger Extent, than that in which it is used, as of the Word [h] *collis* for *colli*, or [i] *mala ars* for *veneficium*. Also it seems agreed, That an Abbreviation not justified by legal Usage, as [k] *Dno* without a Dash, for *Domino*, [l] *R. Rs.* for *Regni Regis*; or the Expression of a Number in any Figures that are not [m] *Roman*, is equally fatal as it would have been wholly to have omitted what you endeavour in such Manner to express. Also it hath been [n] adjudged, That an Inquisition finding that *J. S. seipsum emerfit*, &c. is insufficient, because *emergo* doth not signifie to put into, but rise out of the Water. [o] Also it is said, That an Indictment has been quashed for the Words *Pace Regia*, instead of *Pace Regis*; but it appears not what was the Nature of the Indictment, nor in what Part of it these Words were used, and therefore I would suppose it to have been in such Part of some Indictment wherein those Expressions are so material that they cannot be rejected as Surplus and immaterial; for it seems to be a settled Rule, That nothing which may be so rejected shall vitiate an Indictment; as where the Year of the Lord is written in common [p] Figures, but the Year of the King is well expressed, or where an Indictment is said to be taken before *J. S.* and *J. N.* [q] *duo Justiciariis*, &c. Also it seems, That the Use of a Word which is not proper *Latin*, as of the [r] Word *contrafacere*, for counterfeiting, may be made good by Precedents. And there can be no doubt but that [s] Terms of Art, which are necessary in all Institutions, as *Felonia*, *Murdrum*, *Burglaria*, and such like, are good, tho' they be not good classical *Latin*; for they are of such a complex and peculiar Signification as no proper *Latin* Word will come up to. Also it hath been [t] adjudged, That a literal Translation of a Statute into *Latin* is sufficient, if intelligible, let it be never so unelegant, as where it sets forth that the Defendant *super caput suum proprium*, did forge, Meaning, That he did it of his own Head.

[a] Cro. El. 85. pl. 4. *Quære* 3 Keb. 637.
[b] Cro. El. 231. pl. 22.
[c] Cro. El. 137. pl. 10.
[d] 1 Sid. 175. Salk. 370. pl. 2.
[e] 8 Co. 159. b. 2 Bulst. 35. Moore 5. pl. 17. N. Bend. 33. pl. 53. 1 And. 24.
[f] 1 Lev. 1, 2. 5 Co. 45. Cro. El. 462.
[g] 1 Salk. 51, 52. 6 Mod. 268. Vide Supra, Sect. 88.
[h] 1 Bulst. 109.
[i] Noy. 85. 1 Jon. 144. Latch. 156.
[k] 1 Sid. 175.
[l] 1 Sid. 140.
[m] 1 Salk. 195. 1 Sid. 40. pl. 6. 3 Keb. 301. 2 Lev. 102. 1 Mod. 78.
[n] 2 Lev. 140. 3 Mod. 100.
[o] 1 Sid. 140.
[p] 1 Salk. 195. 1 Mod. 78.
[q] Cro. El. 108. pl. 3.
[r] 2 Jon. 49, 50.
[s] Dalt. Ch. 131. 10 Co. 133.
[t] 2 Lev. 221.

Sect. 90. As to the third Particular, *viz.* What Faults of this kind are holpen by an *Anglicè*. It seems to be holden generally in some Books, That the Use of a Word which is either not *Latin* at all, or not *Latin* in the Sense in which it is used, may in many Cases be holpen by an *Anglicè*,

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as [a] *erectaverunt, anglicè* did erect; [b] *Retes, anglicè* Nets; [c] *Pellices, anglicè* Skins; *Ollis* [d] *æreis, anglicè* brass Pots. But to this it may be answered, That as to the three first of these Instances what is said concerning this Matter is only spoken of by the By, and did not come into Judgment; and as to the last of them it may be said, That it doth not concern a criminal Proceeding, but a civil Action, and that after a Verdict: And if the Purport of it be that an *Anglicè* helps the Use of a Word that is not *Latin* in an Action of Trover, tho' Damage be expressly given for it, it is contradicted by many other express [e] Resolutions, in which it seems to have been taken as a settled Rule, That where Damages are expressly given for a Thing expressed by a Word that is not *Latin*, it is no way help'd by an *Anglicè*. Also it hath been [f] adjudged, That an Indictment for taking *octo discas, anglicè* Dishes, is insufficient; and this is agreeable to what is laid down as a settled Rule in many [g] Books, *viz.* That where there is a proper *Latin* Word for the thing intended to be expressed, no *Anglicè* will help an improper one, as it will do where there is [h] no proper *Latin* Word, because in such a Case there is such a Necessity either to use a feigned one or none at all. Also it hath been adjudged, That where there is a proper *Latin* Word, an *Anglice* cannot make good the Use of any other either in a more [k] special or [l] extensive Signification than the *Latin* Language will bear, as to make Words [m] *malas artes* signifie Witchcraft, or [n] *Riscus* a boxful of Linen, or [o] *fulcrum tecti*, a Field-bed with a Testern and Curtains, in which Cases the Judges will take [p] no manner of Notice of what comes under the *Anglicè* beyond the strict Signification of the *Latin*.

Sect. 91. As to the sixth Point, *viz.* Where the Offence indicted may be laid jointly, and where severally, and where both jointly and severally, and where the Offences of several Persons may be laid in one Indictment; it seems certain at this Day, That notwithstanding the Offence of several Persons cannot but in all Cases be several; because the Offence of one Man cannot be the Offence of another, but every Man must answer severally for his own Crime; yet if it wholly arise from any such joint Act, which in it self is criminal, without any Regard to any particular personal Default of the Defendant, as the joint [q] keeping of a Gaming-House, or the [r] unlawful hunting and carrying away of a Deer, or [s] Maintenance or [t] Extortion, *&c.* The Indictment or Information may either charge the Defendants jointly and severally, as thus: *Quod* [u] *custodiverunt, & uterq; eorum custodivit*; or, *quod* [x] *asportaverunt, & eorum uterque asportavit*; or may charge them jointly only, without charging them [y] severally, because it sufficiently appears from the Construction of Law, That if they joined in such Act, they could not but be each of them guilty; and from hence it follows, That on such Indictment or Information [z] some of the Defendants may be acquitted, and others convicted; for the Law looks on the Charge as several against each, tho' the Words of it purport only a joint Charge against all. But where the Offence indicted doth not wholly arise from the joint Act of all the Defendants, but from such Act joined with some personal and particular Defect or Omission of each Defendant, without which it would be no Offence, as the following a joint Trade without having served a seven Years Apprenticeship required by the Statute, in which Case it must be the particular Defect of each Trader which must make him guilty, and one of them may offend against the Statute, and the others not, the Indictment or Information [aa] must charge them se-

[a] Cro El 231.
[b] Keilw. 100. 3 Bulst. 178. *seems contrary.*
[c] 1 Sid. 318.
[d] Cro. Ja. 129.
[e] 1 Lev. 99, 129, 204. 1 Sid. 98. 318. Raym. 15. 3 Lev. 336. 10 Co. 130, 133.
[f] 2 Keb. 779. pl. 4.
[g] Noy. 85. Latch. 156. March. 16. 60. 1 Jon. 144. 10 Co. 133. Vide 1 Lev. 204. 1 Sid. 318. Yel. 68.
[h] 10 Co. 133. Noy 85. Latch. 156. March. 16. 1 Sid. 81. 1 Jon. 144.
[k] Noy. 85. 1 Sid. 60, 81.
[l] Cro. Ja. 664, 665.
[m] Noy. 85. Latch. 156. 1 Jon. 144.
[n] Cro. Ja. 664, 665. 2 Rol. Re. 254, 255.
[o] 10 Co. 130, 132, 133.
[p] Cro. Ja. 664, 665. 2 Rol. Rep. 254, 255. 10 Co. 130, 132, 133.
[q] Dominus Rex versus Dixon & uxorem adjudged Trin. 2. Georgii.
[r] Dominus Rex versus Howkins, adjudg'd Mich. 3 Georgii.
[s] 1 Vent 302.
[t] Salk. 382.
[u] Dominus Rex versus Dixon & uxorem, adjudg'd Trin. 2. Georgii.
[x] Dominus Rex versus Howkins, adjudg'd Mich. 3. Georgii. [y] Domina Regina versus Williams, adjudg'd Mich. 10. Annæ. Bear & White, 4to. Gulielmi. Cro. Car 380, 381. 2 Rol, Ab. 707. pl. 45, 48, 708. pl. 52. contra 2 Rol. Rep. 345. Palmer, 367, 368. [z] 2 Rol. Ab. 707. pl. 45, 48, 708. pl. 52. Bear & White, 4to Gulielmi. [aa] 2 Rol. Ab. 81. pl. 6. 5 Mod. 180.

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verally and not jointly; for it is abſurd to charge them joinly, becauſe the Offence of each Defendant ariſes from a Defect peculiar to himſelf. And for the like Reaſon a joint Indictment againſt ſeveral for not [a] repairing the Street before their Houſes hath been quaſhed. But I do not find it ſettled in what Caſes ſeveral Offences of ſeveral Perſons may be joined in one Indictment; for in ſome [b] Books Indictments againſt ſeveral for ſeveral Offences, as for Recuſancy, [c] following a Trade without having ſerved an Apprenticeſhip, not [d] repairing the Streets, *&c.* are mentioned without any Exception on this Account: And it is holden, That one Indictment againſt two Juſtices for not [e] inquiring of a Riot, and an Indictment againſt two Perſons for ſpeaking of the ſame [f] Words, may be maintained; and yet it is [g] agreed, That one Action lies not againſt ſeveral for the ſame Words; Alſo in [h] *Rolle*'s Reports an Indictment againſt ſeveral for having Inmates in their Houſes is ſaid to have been quaſh'd; becauſe it was but one joint Indictment againſt them all, whereas there ought to have been ſeveral Indictments againſt them. Alſo in the ſixth [i] Modern Reports, an Indictment againſt ſeveral for the Neglect of a Day of faſting appointed by Proclamation, is ſaid to have been quaſhed for the like Reaſon. And this is certainly moſt agreeable to the Rule of bringing Actions upon penal Statutes, wherein ſeveral Offences ſhall not be joined, except it be in reſpect of ſome one Thing to which all of them have a Relation; as where ſeveral [k] join in a Suit in the [l] Admiralty for a Contract on Land, or in procuring or giving an untrue Verdict, or are privy to one another [m] in Maintenance of the ſame Cauſe.

Sect. 92. As to the ſeventh Point, *viz.* Whether the Words *Vi & armis* be in any Caſe neceſſary in the Body of an Indictment at Common Law; it is taken for granted in ſome [n] Books, That they were neceſſary at Common Law in all Indictments for Offences which amount to an actual Diſturbance of the Peace, as Reſcouſes and Aſſaults, and ſuch like; yet I do [o] not find it agreed, That they were ever neceſſary in ſuch Indictments, wherein it would ſeem abſurd to put them in, as in Indictments for [p] Conſpiracies, [q] Cheats, Slanders, Eſcapes, and ſuch like; or [r] Nuſances committed in a Man's own Ground. However, there can be no doubt but that the Omiſſion of them in Indictments of this kind, is made good by the Statute of 37 *H.* 8. 8. By which it is recited, *That in all Indictments of Felony and Treſpaſs, and divers others, it was common to uſe the Words* Vi & Armis, *and in divers of them to declare the Manner of the Force and Arms, that is to ſay,* vi & armis videlicet baculis cultellis arcubus & ſagittis, *or other ſuch like Words; where of Truth the Parties indicted had no ſuch Weapons at the Time of the Offence, yet for lack of ſuch Words the ſaid Indictments were taken as void, and had been avoided by Writ of Error or Plea,* &c. and thereupon it is Enacted, *That theſe Words* Vi & Armis, videlicet, cum baculis, cultellis, arcubus & ſagittis, *or other ſuch like, ſhall not of Neceſſity be put in any Indictment or Inquiſition: Nor ſhall the Parties indicted have any Advantage by Writ of Error or Plea, or otherwiſe, to avoid any ſuch Indictment or Inquiſition for the Want of theſe or the like Words: But that the ſame Inquiſitions and Indictments, and every of them, lacking the ſaid Words, or any of them, ſhall be adjudged as effectual to all Intents, Conſtructions, and Purpoſes, as the ſame Inquiſitions and Indictments having the ſame Words in them.*

Sect. 93. But notwithſtanding this Statute ſeems to be ſo expreſs as to all Indictments, yet it is [s] holden in many Books, That Indictments of Treſpaſs, and ſuch like, are ſtill inſufficient without the Words *vi & armis*, and many Indictments have accordingly been quaſh'd for want of them, where they are not implied in ſome others, as [t] *reſcuſſit*, or *manu forti*,

[a] 2 Rol. Ab. 81 pl. 7.
[b] 1 Leon 241.
[c] 2 Rol. Ab. 81. pl. 6. Salk. 382.
[d] 2 Rol. Ab, 81 pl 7.
[e] Stiles Rep. 245.
[f] Stiles Rep. 312.
[g] Cro. Ja. 647. 1 Rol. Ab. 781. O. pl. 1. Palm. 313.
[h] 2 Rol. Re. 164.
[i] 6. Mod 210.
[k] Brook Joinder in Action, 5, 47, 100, 108.
[l] f. n. b. 171. Letters D, E. Fitz. decies tantum, 1, 4, 6, 8, 9.
[m] Brook Mainten. 26, 52.
[n] Cro. Ja. 473. 2 Lev. 221. *See the Books cited in the next Section.*
[o] *Quære* Dy. 159. pl. 39. *Quare* ſupra, Ch. 23. Sect. 85. *Yet ſee the Preamble of* 37 H. 8, 8.
[p] 1 Lev. 125 126. Dalt. Ch. 131.
[q] 1 Keb. 652. Dalt. Ch. 131.
[r] Poph. 206. Cro. Ca. 377.
[s] S. P. C. 94. 2 Lev. 221. 1 Sid 140. 1 Bulſt. 205. 1 Lev. 126. 1 Keb. 101. 2 Keb. 154. Vide Poph. 206. Cro. Ca. 377, 378.
[t] Cro. Ja 345 2 Bulſt. 208.
[u] Book 1. Ch 64. Sect. 44. Dalt. Ch. 131.

forti, &c. But it seems difficult to assign any Reason for these Opinions, unless it be, That because the enacting Part of the Statute says, That the Words *vi & armis videlicet cum baculis cultellis*, &c. are not necessary, *&c.* the Meaning was only to take away the Necessity of those superfluous Words *baculis & cultellis*, &c. but not of the Words *vi & armis*, where they are proper and pertinent; but to this it may be answered, That the Preamble seems to complain of the Opinion, that the Words *vi & armis*, whether put by themselves, or used with those other Words, were in any Case thought necessary in Indictments; and it is most natural so to explain the enacting Part of a Statute as to make it extend to all the Mischiefs complained of in the Preamble; besides, the enacting Part of the Statute is express, *That Indictments without those Words* vi & armis videlicet, baculis, cultellis, arcubus & sagittis, *or any of them, shall be as effectual as if they had them comprised in them*; and surely the Words *vi & armis* cannot but be comprehended under those Words, *or any of them*. It is said [a] indeed in *Levinz*'s second Reports, That the Words *vi & armis* are still necessary, because without them there can be no *Capiatur* entered, nor Fine to the King; but this is in Effect to contradict the Statute which says, That an Indictment without those Words shall be as effectual to all Intents, Constructions, and Purposes, as an Indictment with them. Besides, will any one say, That there can be no *Capiatur* nor Fine to the King upon Indictments of Cheats, Conspiracies, and such like? wherein yet it seems to be agreed, That those Words are not necessary. And agreeably hereto, the Court of King's Bench has [b] often refused to quash Indictments of Trespass for the Want of these Words. However, it is certainly safe and adviseable to make use of them where they are proper and pertinent, if it be to no other Purpose than to aggravate the Offence.

[a] 2 Lev. 221.

[b] Cro. Ja. 472, 473. Vide Cro. Ja. 345. 2 Bulst. 208. Dalt. Ch. 131. Lamb. Book 4. Ch. 5. fol. 502, 503. [c] 3 Keb. 490. pl. 45. 1 Keb, 789. pl. 43. 2 Bulst, 258. *See the Cases cited in the following part of this Section.* and Cro. El 186. pl. 10. 6 Mod. 128. [d] Coke's Entries 360. pl. 14, 15, 361. pl. 16. [e] Cokes Ent. 351. pl, 1, 352. pl. 2, 355. pl 7, 8. 356. pl. 9, 358. pl. 11, 12 359 pl. 13. [f] Coke's Ent. 352, 353, 361 pl. 17. 362. pl. 18, [g] Coke's Ent. 358, pl. 10 *See* Rastal's Entries, 263. pl. 7. [h] 2 Roll. Ab. 82 pl. 9 83 pl 5. 6. Contra Cro. Ca 584. [i] Coke's Ent. 253 pl. 4. [k] Coke's Ent. 254. pl. 5.

Sect. 94. As to the eighth Point, *viz.* Whether it be necessary in the Body of an Indictment at Common Law to lay the Offence *contra pacem*, inasmuch as all Offences whatsoever which are subject to a publick Prosecution seem in general to be so, as they are Breaches of the Law, and in that Respect tend to the Disturbance of the quiet and peaceable Government of the King over his People; it seems to be a good general [c] Rule, That no Indictment or Information, for an Offence, capital or not capital, against the Common Law or Statute, can be good, except it expressly suppose such Offence to have been done against the Peace of the King or Kings, in whose Reign or Reigns it was committed. And accordingly I find, That every Precedent of an Indictment in *Coke*'s Entries, whether for [d] Treason, or [e] Felony, or [f] inferior Offences, expressly lays the Offence against the Peace of the King, except only in four Instances, whereof the one is, of an Indictment for a [g] Nusance for not repairing the Highway, which if it may be maintained, seems to depend chiefly on this Reason, That the Offence is of such a Nature, that a Man may be as well guilty of it in his own Ground as in that of another, and therefore it hath been [h] holden, That it needs not to be laid against the Peace, because the laying it in such a Manner may seem to imply somewhat of Force or Trespass against the Person or Possession of another; but it seems difficult to reconcile this Opinion with those many Resolutions taken Notice of in the following Part of this Section, by which Indictments, for want of these Words, *contra pacem*, have been adjudg'd insufficient, where the Offences could on no other Account be said to be against the Peace, than as they were Breaches of the Law, as all Nusances certainly are. And one [i] other of the said Instances in *Coke*'s Entries is, of an Indictment of *Homicide* by Misadventure, and one other [k] of an Indictment of *Homicide* in Self-Defence;

fence; but these Precedents, if they may be maintained, seem to depend chiefly on this Reason that such Offences are supposed to be owing rather to the Misfortune than Fault of the Party. And the † fourth of the said Instances is of an Indictment of Perjury on the Statute, which concludes in *contemptum Regina*, &c. *& contra formam statuti*, without adding *contra pacem*. But [a] *Rastal*'s Precedents, both of Indictments of Felony, and of inferior Offences do as often omit the Words *contra pacem*, as make use of them. However, certainly the much greater Number of Precedents expressly conclude *contra pacem*, and the Authority of these is much strengthened by those many Cases in the Reports, wherein Indictments and Informations appear to have been quash'd for want of the Words *contra pacem*; as Indictments and Informations for [b] Barretry, [c] Forgery, [d] retaining a Servant without a Testimonial from his last Master, [e] following a Trade without having served an Apprenticeship, [f] erecting a Cottage, [g] Assault and Battery, *&c.* But it seems clear from all the Precedents, That neither an Information [h] *qui tam*, on a penal Statute, nor an Information by the King for an [i] Intrusion, or other [k] Wrong of a Civil Nature done to his Lands, Goods, or Revenues, need the Words *contra pacem*.

† Coke's Entries, 363. pl. 19.
[a] Rastal's Entries, 263.
[b] 2 Rol Ab. 82. pl. 5. Cro. Ja. 527. pl. 4.
[c] 2 Rol. A. 82. pl. 11.
[d] 1 Mod. 78.
[e] 3 Keb. 790. pl 45.
[f] 1 Keb. 501. pl 58, 848. pl. 48. 6 Mod. 128.
[g] 1 Keb. 474. pl. 91. 2 Keb. 36. pl. 72.
[h] Vide 2 Keb. 779. pl 7. Yelv. 66.
[i] Rastal's Entries, 409 pl. 2. 1 Keb. 860. pl, 70.
[k] Coke's Entries *from* 364 *to* 372. 393. pl. 17. Rastal's Entries, 412. pl. 4. Coke's Entries, *from* 372 *to* 390. Rastal's Entries, 410. pl. 3. Coke's Entries, 390. pl. 16. Yelv, 66. Vide 4 H. 6. 4 pl. 7. Fitz. brief. 25.

Sect. 95. If the Offence indicted be expressly laid partly in the Reign of one King, and partly in the Reign of another, as where *J. S.* is indicted for having erected a Wear in the Time of Queen *Elizabeth*, and continued it in the Time of King *James*, and thereupon the Indictors conclude, That so the Wear was erected and continued *contra pacem Regis*, &c. without adding *contra pacem nuper Reginæ*, the Indictment is [l] insufficient, because it appears, That the Commencement of the Wrong, which is as much indicted as the Continuance, was in the Reign of Queen *Elizabeth*; and consequently, if a Crime, must have been against the Peace of her Reign. But if the Indictors had concluded only, That *J. S.* so continued the Wear *contra pacem Domini Regis*, &c. and had laid the Erection of it by way of Recital, or Inducement only, it is [m] said, That the Indictment had been good, because it should be taken as an Indictment for the Continuance only.

Sect. 96. As to the ninth Point, *viz.* Whether it be necessary in the Body of an Indictment at Common Law, to lay the Offence *contra coronam & dignitatem Regis*, it is observable, That all the Precedents of Indictments in *Coke*'s Entries, cited in the ninety fourth Section, which lay the Offence *contra pacem*, lay it also *contra coronam & dignitatem Regis*, &c. Yet not one of [n] *Rastal*'s Precedents doth so; neither do I find any one Case wherein an Indictment against which no other Exception could be taken, has been adjudged [o] insufficient for the Want of these Words. But on the contrary I find it expressly resolved in [p] *Holbrook*'s Case, That an Indictment of a Riot is good without them.

[l] Yelv, 66.
[m] Yelv. 66. 4 H. 6, 4. pl. 7. Fitz brief. 25.
[n] See Rastal's Entries, 263.
[o] *See* 2 Bulst. 258. Aleyn, 49, 50.
[p] 2 Rol. Ab. 82. pl. 1.

Sect. 97. As to the tenth Point, *viz.* Whether it be necessary in the Body of an Indictment, at Common Law, to lay the Offence *in contemptum Regis*, it is so laid in some Indictments of inferior Crimes in [q] *Coke* and *Rastal*, and in others [r] not. Also it is so laid, with the Addition of the Clause *contra leges suas*, in every Information of Intrusion upon the King's Lands in [s] *Coke* and [t] *Rastal*, and also in an Information in [u] *Coke* for a Trover and Conversion of the King's Goods. But in [x] two Informations for Mines claimed by the King, which are the only Precedents I find of

[q] Coke's Ent. 353, 363. pl. 19.
[r] Rastal's Ent. 263. pl 9.
[s] Coke's Ent. 362. pl. 17, 18.

Rastal's Ent. 263. pl. 6, 7, 11. [t] Coke's Entries, 372. pl. 10, 376. pl. 11, 379. pl. 12. 381. pl. 13. 385. pl 14. 387. pl. 15. 1 Coke, 16. b. 26. b. [t] Rastal's Entries, 412. pl. 4. [u] Coke's Entries, 390. pl. 16. [x] Rastal's Entries, 410. pl. 3. Pow. Com. 310.

this

this kind, the ſuppoſed Injury is laid only *ad damnum Regis*, without either of the ſaid Clauſes; neither do I find either of them in any Indictment of Treaſon or Felony, nor in any Information *qui tam* in *Coke* or *Raſtal*; and though it ſeems to be admitted in the Year-Book of [a] 4 *H.* 6. that in an Action on a Statute it is neceſſary to conclude, *in contemptum Domini Regis*, yet in [b] *Lutwyche*'s *Entries* it is oftner omitted than us'd, and no Exception appears to have been taken for the Omiſſion.

Sect. 98. As to the eleventh Point, Whether it be neceſſary in an Indictment at Common Law to lay the Offence *illicitè*, I cannot find this Word uſed in any one of *Coke*'s or *Raſtal*'s Precedents of Indictments, neither do I find any clear and expreſs [c] Authority, that it is in any Caſe neceſſary in an Indictment at Common Law; but on the contrary I find it expreſsly [d] adjudged, That it is not neceſſary in an Indictment of a Riot, becauſe the Act it ſelf contained in the Indictment ſo plainly appears to be unlawful. But where a Statute uſes the Word unlawfully in the Deſcription of an Offence, it is certain that an Indictment grounded on it muſt uſe the Word *illicitè*, or ſome other tantamount.

Sect. 99. As to the twelfth Point, *viz.* Whether a Defect in any of the Particulars above-mentioned be amendable, I take it to be [e] ſettled, That no criminal Proſecution is within the Benefit of any of the Statutes of Amendments; from whence it follows that no Amendment can be admitted in any ſuch Proſecution, but ſuch only as is allowed by the Common Law. And agreeably hereto I find it laid down as a [f] Principle in ſome Books, That the Body of an Indictment removed into the King's Bench from any inferior Court whatſoever, except only thoſe of *London*, can in no Caſe be amended; but it is [g] ſaid, That the Body of an Indictment from *London* may be amended, becauſe by the City-Charter a Tenor of the Record only can be removed from thence. [h] And it ſeems, That by the Courſe of the King's Bench, a Rule may be made on any Coroner to amend even the Body of his Inqueſt by his Notes in a meer Matter of Form. But I do not find it any where holden, that this can be done after it is filed, by which it becomes a Record of the Court; and then the ſame Objections ſeem to lie againſt the Amendment of it, as of an Indictment. But it ſeems to be [i] agreed, That the Caption of an Indictment from any Place, may upon Motion be amended by the Clerk of the Aſſiſes or of the Peace, ſo as to [k] make it agree with the original Record at any Time during the ſame Term in which it came in, [l] but not in a ſubſequent Term. But I have known it holden, That the Caption of an Inquiſition cannot be amended at any Time after it is filed, any more than the Body; the Reaſon whereof perhaps may be this, that the Caption being part of, and drawn at the ſame Time with the Inquiſition, greater Exactneſs is required in it than in that of an Indictment, which is left as a Thing of Courſe to be drawn up by the Clerk of the Court, when occaſion ſhall require. Alſo by the Opinion of two Judges againſt that of two, the Want of Continuances in the Record of an Attainder of Felony [m] cannot be amended by the Certificate of the Clerk of the Aſſiſes, eſpecially if the King ſignify his Pleaſure, that he doth not deſire any Amendment. And it ſeems to be [n] ſettled at this Day, that no Diſcontinuance is amendable in any criminal Proſecution, [o] without Conſent. But it hath been [p] adjudged, That a meer Miſpriſion in the joining of an Iſſue in a criminal Proſecution, as where the Word *ſimiliter*, *&c.* is omitted, may be amended

[a] 4 H. 6. 4. pl. 7. Fitz Brief 25.
[b] Lutw. 132, 133, 134 135, 139. 165, 167.
[c] *See* 1 Keb. 859. pl. 68. 2 Keb. 715. pl. 99.
[d] 2 Rol. A. 82. pl. 4.
[e] 1 Jon. 421. 1 Salk. 51, 52. 6 Mod. 268, &c. Vide ſupra, Ch. 23. Sect. 127. 1 Sid. 66. pl. 39.
[f] 1 Keb. 252. pl. 20. 2 Keb. 580. pl. 112. 1 Sid. 155. pl. 5. Vide 1 Keb. 45. pl. 120. 2 Keb. 141. pl. 13, 142. pl. 15. Contra 2 Bulſt. 35.
[g] 1 Keb. 252. pl. 20. 1 Sid. 155. pl. 5. 229, 230. 1 Keb. 571. pl. 26. Vide Hob. 135.
[h] *See* B. 1. Ch. 27. Sect. 16.
[i] 1 Saund. 249 1 Sid. 175. pl. 7. 1 Keb. 656. pl. 36. 3 Mod. 167.
[k] Cro. Jac. 276, 277. Vide 1 Sid. 155.
[l] 1 Sid. 155. pl. 5. 1 Keb. 45. pl. 120. 656. pl. 36. 1 Sid. 175. pl. 7. 12 H. 7. 25. pl. 3. 10 Ed. 4. 15. pl. 15.
[m] 1 Rol. Ab 196. A. 1 Jon. 420.
[n] 1 Salk 51, 52. 6 Mod. 268. Bro. Amendment 10, 17, 66, 92. Fitz. Amendment 59. 29 E. 3. 32. Diſcontinuance de proceſs 47.
[o] 21 H. 7. 40. pl. 65. Fitz. Amendment 78.
[p] Cro. Jac. 502, 529, 530. 2 Rol. Rep 59.

amended at any Time. Alſo it hath been [a] adjudged, That the Direction of a *Venire*, *Vicecomitibus* of ſuch a Place, which is returned by *J. S. vicecomite*, may be amended on the Oath of *J. S.* that there is but one Sheriff of the Place, which is himſelf. Alſo it is every Day's Practice to amend [b] criminal Informations, and the Pleadings thereon by Rule of Court, while all is in Paper. And [c] *Quære* if the Record may not be ſo amended by the Paper-Book at any Time before Judgment?

Sect. 100. It ſeems to have been anciently the common Practice where an Indictment appeared to be inſufficient, either for its Uncertainty, or the Want of proper legal Words, not to put the Defendant to anſwer it; but if it were found in the ſame County in which the Court ſate, to award Proceſs againſt the Grand Jury, to come into Court and [d] amend it. And it ſeems to be the common Practice at [e] this Day, while the Grand Jury who found a Bill, is before the Court, to amend it by their Conſent in a Matter of Form, as the Name or Addition of the Party, *&c.*

Sect. 101. And now I am in the ſecond Place to ſhew what ought to be the Form of the Body of an Indictment upon a Statute; for the better Underſtanding whereof, having premiſed, that the ſame Rules which have been already laid down concerning Indictments at Common Law, are generally applicable to Indictments on Statutes, I ſhall in this Place conſider ſuch Matters only as more peculiarly belong to the Form of the Body of an Indictment upon a Statute, under the following Particulars:

1. Whether it be neceſſary that ſuch Indictment recite the Statute whereon it is grounded.
2. What Miſ-recitals of ſuch Statutes are fatal.
3. How far it is neceſſary to bring the Offence indicted within the very Words of the Statute.
4. Whether an Indictment grounded on a Statute, which will not maintain it, may be made good as an Indictment at Common Law.
5. How far it is neceſſary to conclude *contra formam Statuti.*

Sect. 102. As to the firſt Particular, *viz.* Whether it be neceſſary that ſuch Indictment recite the Statute whereon it is grounded, I take it to be [f] ſettled, that there is no Neceſſity in any Indictment or Information on a [g] publick Statute, to recite ſuch Statute, whether the Offence be ſuch only becauſe prohibited, or be an Evil in its own Nature, and whether it be prohibited by more than one Statute, or by one only; for the Judges are bound *ex officio* to take Notice of all publick Statutes, [h] and where there are more than one by which an Indictment or Information may be maintained, they will go upon that which is moſt for the King's Advantage.

As to the ſecond Particular, *viz.* What Miſ-recitals of ſuch Statutes are fatal, I ſhall endeavour to ſhew:

1. Whether all Miſ-recitals of the ſubſtantial Part of a Statute are fatal.
2. What Miſ-recitals of the Place or Time at which the Parliament was holden.
3. Whether a Miſ-recital of the Title of a Statute.
4. What other Miſ-recitals are fatal.

[a] 1 Keb. 900. pl. 71. 901. pl. 75. 1 Sid. 244. Vide 8 Co. 156. b. 3 Lev. 430.
[b] 1 Salk. 47. pl. 1, 2, 3.
[c] Salk. 47. pl. 2, 3. Salk. 50. pl. 10. Vide 1 Keb. 452. pl. 45. Cro Ca. 144. 1 Lev. 189. 3 Lev. 430.
[d] 22 Aſſ. pl. 73. 2 Ed. 3. 1. pl. 3. 8 H. 5. 8. pl. 4 S. P. C. 97. Letter A. Fitz. Indictment 2, 3. 27. Vide 25 E. 3. 43. pl. 36. Bro. Indictment 12.
[e] Kelynge 37.
[f] 5 H. 7. 17 b. Fitz. Action ſur le Statute 7. 20. 2 Rol. A. 79. pl. 8. Plowd. Com. 1, 79, &c. 1 H. 6. 1. pl. 2. 4 Co. 48. a. Cro. El. 236. pl. 1. Cro. Ca. 229. Dyer 155. pl. 19. 346. pl. 9. Bro. Action ſur le Stat. 4 Parliam. 15. *but* Cro. El. 187. pl. 12. 47 Ed 3. 10. pl. 7.

Dyer 159. pl. 37. Bro Parliament 75. Bro. Champerty 1. Show. 337. F. N. B 55. C. *ſeem contrary*. Quære 6 Mod. 140, 141. [g] Moor. 468. pl. 669. Moor 699. pl. 972. 4 Co. 13. 76. Bro. Avowry 5. Bro. Parliament 15, 32. [h] Dyer 155. pl. 19. Dyer 346. pl. 9. 5 H. 7. 17. b. 6 Mod. 140. Vide Cro. El. 187. pl. 12.

Sect. 103. As to the first of these Particulars, it seems to be settled, That notwithstanding there be no Necessity to recite a publick Statute; yet if the Prosecutor take upon him to do it, [a] and materially vary from a substantial Part of the Purview of the Statute, and conclude *contra formam Statuti prædicti*, he viciates the Indictment, because it judicially appears to the Court, that there is no such Foundation for the Prosecution, as that whereon it is expressly grounded; as where in an [b] Indictment with such a Conclusion on the Statutes which prohibit Entries with strong Hand, the Word *Vi* is put for *manu forti*; or where the Word [c] *nuncia* is put for *mendacia* in such an Indictment on the Statutes against the Tellers of Lies of great Men; [d] or where the Verb in a Statute which expresses the principal Act wherein the Offence consists, is expressed in such an Indictment on such a Statute, by a Word which is neither classical nor legal *Latin*; [e] or where a Statute in describing the Courts wherein it prohibits Persons to bring Actions in other Names without their Privity, calls them Courts wherein Pleas are holden in Actions personal, *&c.* and you in reciting it in such an Indictment call them Courts wherein Pleas are holden in any Actions.

[a] Pl. Com. 79, 83. b. 84. Cro. El. 236, 245. pl. 4. Palm. 565. 4 Co. 48.

[b] Cro. El. 93. pl. 2. 2 Bulst. 258.

[c] 4 Co. 12. b. 13. Cro. Ca. 135.

[d] 2 Jon. 49, 50. 3 Keble 661. pl. 11.

[e] Cro. El. 236.

Sect. 104. Yet it seems that the following Mis-recitals of the substantial Part of the Purview of a Statute in any Indictment are not fatal, as the Omission of a synonymous Word, having no other Meaning than what is fully expressed in the Words which are recited; or the joining of Words which are either wholly Synonymous, or much of the same Sense, as signifying such Things as generally include one another, (as [g] the Words *malitiosè & contemptuosè*, *&c.*) with a Copulative, where the Statute uses a Disjunctive, or the using the singular Number for the Plural, or the Plural for the Singular, where the Sense is the same; as where in [h] reciting a Statute speaking of Suits in any Courts, you Use the Words *in aliqua Curia*; or where in reciting the Statute against disturbing Persons in their open Preaching, you use the [i] Words *in apertis prædicationibus*.

[f] Cro Ja. 362. *See the 108th Section.*

[g] 2 Bulst. 47, 49, 50, 51, 52, 53.

[h] Cro. Ca. 522, 523.

[i] 2 Bulst. 47, &c.

Sect. 105. Also it [k] seems that no Advantage can be taken of a Variance from any Part of a private Statute, without shewing it to the Court in a proper Manner, because otherwise such a Statute shall be taken to be as it is recited.

[k] 4 Co. 13. 1 Sid. 356.

Sect. 106. As to the second of the Particulars above mentioned, *viz.* What Mis-recitals of the Place or Time at which the Parliament was holden, are fatal, [l] it seems to be generally agreed, That a Mis-recital of the Place or Day at which the Parliament was holden, vitiates an Indictment. [m] As if a Parliament be first holden on the twenty-eighth of *April*, in the thirty-second Year of *Henry* VIII. and afterwards holden by Prorogation on the twelfth of *April* the next Year, and a Statute then made, be recited as made at a Parliament holden on the twenty-eighth of *April*, in the thirty-second Year of *Henry* VIII. Or if a Parliament be summoned to meet on the twenty-third of *January* in such a Year, and before the Meeting be prorogued to the twenty-fifth, and then holden, and a Statute made by such Parliament be [n] recited as made in a Parliament holden on the twenty-third; or if a Parliament first holden on one Year be continued by Prorogation to another, and then sit again, and a Statute made at such Sessions be [o] recited as made in a Parliament holden or begun at such second Year, (which is all one,) instead of saying that it was made at a Sessions of Parliament then holden, and the Indictment conclude *contra formam Statuti prædicti*, the Variances in Strictness are fatal; for the Court will not make any Case better than the Record has made it, and therefore where that expressly grounds it on the Act of

[l] Bro. Parliament 87. Cro. El. 853. pl. 12.

[m] Plow. Com. 79, 83, 84. Cro. Ca. 136, 232. 3 Keb. 468. pl. 55. 2 Jon 50. Hob. 310. Cro. Ja. 139. Cro. El. 245. pl. 4. *But this is made a Query by* Coke *in* 2 Bulst. 53.

[n] Dyer 203. pl. 72, 73. Hetly 129.

[o] Cro Ja. 111. pl. 9. 139. Lutw. 140. 4 Inst. 27. vide 1 Brown. 100 Yelv. 127 Dyer 95. pl. 36, 37, 38, 171. pl. 6.

of a ſuppoſed Parliament, where there was no ſuch Act, the Court will not find one out to make it good. Alſo it hath been [a] adjudged, That a Repugnancy in ſetting forth the Time when a Parliament was holden, is fatal, as if a Statute be recited as made on ſuch a Day, in the firſt and ſecond Years of ſuch a King, for it is impoſſible that one and the ſame Day ſhould be in two Years. Alſo it is holden in [b] *Croke*'s Reports, That an Indictment was diſcharged for not ſhewing in what County a Parliament was holden; but no Reaſon is given for this Opinion, [c] and it hath been adjudged, That the total Omiſſion of the Day when the Parliament was holden, is no Fault in the Recital of a Statute. Alſo it ſeems to be [d] agreed, That a Miſtake in ſuppoſing a Statute to have been made at a Parliament holden in ſuch a Year, when in Truth it was then holden by Prorogation, may be help'd by the conſtant Courſe of Precedents upon ſuch Statute. Alſo it ſeems to be [e] agreed, That not only a Miſ-recital of the Day whereon the Parliament was holden, but even a Miſ-recital of the Purview of a Statute may be ſalved by a general Concluſion *contra formam Statuti*, without adding *prædicti*, *&c.* [f] But I do not find it ſettled, Whether a Fault of this Kind can be help'd by the Defendant's Admittance, that there is ſuch a Statute as is ſuppoſed; and it will be difficult to maintain that the Party's Admittance of what the Court judicially knows to be contrary to the Truth, can make good any Judgment.

[a] Moor 302. pl. 452.
[b] Cro.El.106. pl. 21.
[c] Dyer 203. pl. 74.
[d] Yelv. 127. Brownl. 100. 2 Keb 34. pl. 68. Dyer 171. pl 6.
[e] Cro. Car. 232, 233. Pal. 565. Raym. 191, 192. 3 Keb. 647, 648. Lutw. 140.
[f] *Affirm'd* Cro. Jac. 139. *Denied* Cro. El 236.

Sect. 107. As to the third of the Particulars above-mentioned, *viz.* Whether the Miſ-recital of the Title of a Statute be fatal, it is [g] ſaid to have been holden by Sir *Matthew Hale*, That the Miſ-recital of the entituling of an Act will not vitiate a Replication, becauſe it is not Matter of Subſtance; and a Judgment is [h] ſaid to have been lately given in the Court of Common Pleas agreeable to this Opinion; but the contrary is [i] ſaid to have been ſince adjudged in the Court of King's Bench.

[g] Hardreſs 324.
[h] 6 Mod. 62.
[i] 6 Mod. 62.

Sect. 108. As to the fourth of the Particulars above-mentioned, *viz.* What other Miſ-recitals of a Statute are fatal, [k] it is ſaid to have been often adjudged, That a Variance in reciting a Statute to commence after the making, where the Statute is expreſs, that it ſhall commence after the End of the Seſſions, is fatal. But I take it to be a ſettled Rule, That a Variance no Way altering the Senſe of the Statute does [l] no hurt; as where in the Recital of an Oath preſcribed by Statute, the Words *Sea of Rome* are put for *See of Rome*; and *I do declare in Conſcience* inſtead of *I do declare in my Conſcience*. Alſo it ſeems to be [m] agreed, That a Variance from an immaterial Part of a Statute does no hurt, [n] and therefore that where a Statute contains ſeveral Branches relating to ſeveral diſtinct Matters, an Omiſſion of ſuch Branches as no way relate to the Offence indicted does no hurt, becauſe they are nothing to the preſent Purpoſe. Alſo it hath been adjudged, That every Miſ recital even of ſuch Branch is not fatal; as if it vary only in ſuch a Part of the Deſcription of the Offence, as is put in only by Way of Flouriſh, and *ex abundanti*, and makes no neceſſary Ingredient in the Offence prohibited, nor needs any Proof; as if in a Proſecution on the Statute of 12 *R.* 2. the [o] Recital be that none ſhall deviſe, ſpeak, or tell any falſe News, Lies, or other ſuch falſe Things, *&c. unde diſcoraia aut aliqua lis* (*Anglicè* Debates) *inter magnates vel inter magnates & communitatem dicti Regni oriri poſſint*; where the Words of the Statute are, *That none ſhall deviſe, ſpeak, or tell any falſe News, Lies, or other ſuch falſe Things*, &c. *whereof Diſcord or any Slander might riſe within the ſaid Realm*; for the firſt Words, *viz. That none ſhall deviſe*, &c. *any falſe News, Lies, or other ſuch falſe Things*, &c. are only material.

[k] 2 Rol. Abr. 465. Letter B.
[l] 1 Vent. 172.
[m] Cro.El.186. pl. 10. 4 Co. 48 Palm. 565. Cro. Ca. 135, 136, 564. 1 Jon. 194.
[n] Plowd. Com 65, 105. a. Dyer 103. pl. 7. Hob. 226. 3 Keb. 662.
[o] Cro. Car. 135, 136. Palm 565. 1 Jon. 194.

material. Indeed as this Case is reported by *Croke*, there is a Mis-recital even in this Part, for instead of *other false Things*, the Recital is said to mention *other Things* generally, omitting the Word *false*; but I suppose that this is a Mistake of the Printer, and that there is no such Variance in the Record of the Case, because no Exception is reported to have been taken to it.

Sect. 109. But if a Mis-recital of such a Part of the Purview of a Statute be not fatal, it seems *à fortiori* to follow, That a Mis-recital of the Preamble is not material, where the substantial Part of the Purview is well recited. And upon this Reason chiefly, as I suppose, it hath been adjudged, That if in an Action on the [a] Statute of Hue and Cry for a Robbery, the Declaration recite the Preamble to speak of the Burning of Houses, where the Statute mentions Arsons generally, without any particular mention of the Arson of Houses; or in an Action for the Slander of an Earl, on 2 *R.* 2. 5. if the Declaration in reciting the Preamble, mention only what relates to Earls, *&c.* and omit the Clause concerning the other great Officers, [b] yet the Plaintiff may have Judgment, especially after Verdict. And these Resolutions seem to weaken the Authority of *Parker*'s Case reported by [c] *Hutton*, wherein it was said to have been holden by three Judges against the Opinion of *Hobart*, that the putting of the Word *indicari* for *indictari* in the Recital of the Preamble of the said Statute of Hue and Cry, in a Writ grounded thereupon, is fatal.

[a] Vide 3 Keb. 647. pl. 68. 661, 662.
2 Jon. 51.
[b] 2 Jon. 49, 50, 51.
3 Keb. 647. pl. 68.
3 Keb. 661, 662.
Vide Cro. Jac. 139.
[c] Hutton 56, 57.
3 Keb. 648, 662.
2 Jon. 50, 51.

Sect. 110. If an Indictment on 8 *H.* 6. in reciting that Part of the Statute which declares in what Actions the Party grieved shall recover his Damages, after having mentioned Recoveries by Verdict, omit the [d] Words *or in any other Manner*; or use the [e] Words *Assisum novæ disseisinæ* for *Assisam novæ disseisinæ*; [f] or recite the Statute, as giving the Fine on a Recovery by Action *dicto Domino Regi*, where there is nothing to make good the Word *dicto*; [g] or recite the Statute relating to the bringing an Action to be, *if the Party after such Entry make any Feoffment*, &c. where the Words are, *if after such Entry any Feoffment be made*, or [h] recite it to be *if any Person be put out and disseised* in the Conjunctive, where the Words of the Statute are, *if any Person be put out or disseised* in the Disjunctive, the Variances have been adjudged fatal. Yet [i] it hath been holden, That the last of these is an immaterial Variance, because tho' the Words above-mentioned be disjunctive in the Statute, they have always been expounded in the Copulative. Also it may be questioned how far the rest of these Authorities may be Law at this Day, since of [k] late the Court has not been so strict in Recitals as formerly; and if an Indictment fully recite a Statute so far as it concerns Indictments, a Misprision in what concerns other Matters seems to be much help'd by the Authority of the Cases above-cited.

[d] Cro El. 186. pl. 10.
[e] Cro El. 93. pl. 2.
[f] 1 Bulst. 218.
[g] Cro. El. 307. pl. 10.
Parallel Case, Cro. El. 697. pl. 10.
[h] Cro. El. 96. pl. 9. Vide Cro. El. 697 pl. 10.
[i] Cro. El. 307. pl. 10.
[k] 3 Keb. 662.

Sect. 111. It hath been [l] adjudged, That a total Omission of the Clause of a Statute which ordains what the Party shall forfeit, does no hurt. Yet if the Statute be wholly mis-recited in such Clause, as if the Words [m] *admitteret* or *forisfaceret* be used in such Clause for *amitteret* and *forisfaceret*, the Exception for the Variance seems to have greater Weight. Yet if the Word mis-recited be synonymous with the other which is rightly recited, and the [n] whole Purport of both as fully expressed in one Word, which is properly recited as if both had been used, as it certainly is in the Case above-cited, wherein the Word *forisfaceret* is rightly recited, and the Word *amitteret* mis-recited, it may perhaps be questioned whether such an Exception would be fatal at this Day, especially considering that it is in a Part

[l] 20 H. 6. 31, 32. *which seems mistaken in the Abridgments*, Fitz. Brief 86. Bro. Champerty 1. Vide Plowd. Com. 84. b. Dyer 160. pl. 40.
[m] Cro. Jac. 133. pl. 5.
[n] Vide Cro. Jac. 362.

Part of the Statute which might as well have been omitted in the Recital; and there is no Variance but from a Word wholly nugatory and superfluous, and the Senſe would be compleat by rejecting the Word miſtaken, as ſurplus and inſenſible. But if in the Miſ-recital of ſuch a Clauſe, there be ſuch a Variance as carries with it a plain material Repugnancy to the Intent of the Statute, [a] as where the Words, *whoever ſhall do the ſame, ſhall incur the Pain*, &c. are thus recited, *whoever ſhall do the contrary, ſhall incur the Pain*, &c. I do not well ſee how any Thing can be ſaid to make it good; for it is a general Rule, That [b] Repugnancies in Indictments are fatal, and the Proſecutor himſelf declares, That not thoſe who do the Thing indicted, but thoſe who do it not are within the Penalty of the Statute.

Sect. 112. As to the third Particular, *viz.* How far it is neceſſary to bring the Offence indicted within the very Words of the Statute; I take it for a general Rule, That [c] unleſs the Statute be recited, neither the Words *contra* [d] *formam Statuti*, nor any *Periphraſis*, Intendment or [e] Concluſion will make good an Indictment, which does not bring the Fact prohibited or commanded, in the doing or not doing whereof the Offence conſiſts, within all the material Words of the Statute. And upon this Ground it hath been reſolved, That an Indictment of Rape finding that the Defendant ſuch a Day and Place, *&c.* A. B. *felonicè cepit, & eam ad-tunc & ibidem carnaliter cognovit, &c. contra voluntatem ſuam, &c.* is not [f] ſufficient without the Word *Rapuit*; becauſe that is the Word uſed by the Statute which makes the Offence Felony. Alſo it hath been [g] adjudged, That Indictments for Perjury on 5 *El.* 9. omitting the Words *voluntariè & corruptè*, in ſetting forth the Swearing; and Indictments for ſtriking in a Church on 5 *&* 6 *Ed.* 6. 4. [h] omitting the Words *to the Intent to ſtrike*, &c. and Indictments for aiding the Procurers of the Pope's Bulls on 13 *El.* 4. [k] omitting the Words *To the Intent to ſet forth*, &c. *the uſurped Power*, &c. and Indictments for Foreſtalling on 5 *&* 6 *Ed.* 6. 14. ſetting forth, That the Defendant bought certain Goods of *J. S.* which he was about to ſell at ſuch a Market; but [l] not expreſsly alledging, That *ſuch Goods were then coming to ſuch Market to be ſold*; and [m] Indictments for ingroſſing on the ſame Statute, ſetting forth, That the Defendant bought ſo much Corn, *&c.* without alledging, That *he ingroſſed it*, &c. *by buying*, &c. and [n] Indictments for Treaſon in Compaſſing the King's Death, on 25 *E.* 3. having neither the Word *Compaſs* nor *Imagine*, *&c.* cannot be taken as Indictments on ſuch Statutes. And the like hath been adjudged in many other [o] Caſes.

Sect. 113. Neither doth it ſeem to be always ſufficient to purſue the very Words of the Statute, unleſs by ſo doing you fully, directly and expreſsly alledge the Fact in the doing or not doing whereof the Offence conſiſts, without any the leaſt Uncertainty or Ambiguity; for it hath been [p] adjudged, That an Indictment for Perjury on 5 *El.* 9. ſetting forth, That the Defendant *tacto per ſe ſacro evangelio falſo depoſuit, &c.* is not good without directly ſhewing that he was ſworn. Alſo it hath been [q] adjudged, That an Information on 18 *H.* 6. 17. for not abating ſo much of the Price of Wine ſold as the Veſſels wanted of the Statute-Meaſure, is inſufficient if it do not expreſsly ſhew how much they wanted. Alſo it is ſaid, That an Indictment on the Statute of Uſury ſetting forth, That the Defendant took more than five in the Hundred, is not good, without ſhewing in particular how much.

[a] 4 Co. 12. b. 13. a.
[b] Supra Sect. 64, 65.
[c] Cro.El.535. 67. *See the Books cited to the later Part of this Section,* Cro. El. 749. pl. 2. *ſeems contrary.*
[d] Dy. 363. pl. 25. 2 Ro.Re.227, 263. 2 Leon. 211. 11 Co. 58. a.
[e] Cro El.147. pl. 11. Cro. El. 201. pl. 30. 2 Leon. 211.
[f] 9 Ed 4 26. Bro. Indictment 7. Vide ſupra ch.23.Sec.77.
[g] Cro El.147. pl. 11. Cro. El. 201. pl. 30. 2 Leon. 211. Vide Coke's Entries 367, 368.
[h] Cro.El.231. pl. 23. 2 Leon. 188. Noy 171.
[k] Dy. 363. pl. 25.
[l] 1 Rol.Rep. 421. *See* Book 1. Ch. 80. Sect. 12, 13.
[m] 2 Leon.39. *See* Book 1. Ch. 80 Sect.15 & 20.
[n] Kelynge 8. B. 1. Ch. 17. Sect. 8.
[o] 11 Co.58 a. Dyer 346. pl. 9. 2 Ro.Re.227, 263. Sup Sec.106. 2 Rol.Ab.81. pl. 15. 9 Ed.4.26,27.
[p] Cro El.105. pl. 17. *See* 9 Ed.4.26.
[q] 2 Leon. 38, 39.

Sect. 114. As to the Deſcription of the Perſon of the Defendant, in order to bring him within the Purview of a Statute, which extends only to ſuch Kind of Perſons as are ſpecially mentioned in it; it is a good [a] general Rule, That every Indictment muſt bring the Defendant within all the Deſcriptions mentioned in the Body of the Act, except they are ſuch as carry with them the bare Denial of a Matter, the Affirmation whereof is a proper and natural Plea for the Defendant; as where it is enacted, That all Perſons having no reaſonable Excuſe to be abſent, ſhall go to their Pariſh-Church, *&c.* in which Caſe it is ſaid, that it is not neceſſary to ſhew, That the Defendant had no reaſonable Excuſe, for this will come moſt properly in queſtion from the Plea of the Defendant. Alſo it ſeems that there is no need in deſcribing the Defendant to ſet forth the Place where the Thing happened, which brought him within the Deſcription, as hath been more fully ſhewn in the 86th Section. Alſo it hath been adjudged, That it is [b] ſufficient in deſcribing the Defendant to ſay, That he *exiſtens* ſo and ſo, as the Statute mentions, did the Fact, without alledging that he was ſo at the Time of the Fact; for that ſhall be intended, as hath been more fully ſhewn in the ſixty-third Section.

[a] Poph. 93, 94. *See* Book 1. Ch. 10. Sect. 2. 2 Leon. 5. Quære 2 Keb. 582. pl. 18.

[b] Moor 606. pl. 838. Cro. Jac. 610. 2 Leon. 5. 2 Lev. 229. 2 Ro. Re. 226. contra 2 Ro. Re. 263. Quære Raym. 378. 1 Keb. 852. pl. 55.

Sect. 115. It ſeems [c] agreed, That there is no need to alledge in an Indictment, that the Defendant is not within the Benefit of the Proviſoes of a Statute whereon it is founded; and this hath been [d] adjudged, even as to thoſe Statutes which in their Purview expreſsly take Notice of the Proviſoes, as by ſaying, That none ſhall do the Thing prohibited, otherwiſe than in ſuch ſpecial Caſes, *&c.* as are expreſſed in the Act. But as I take it, a Conviction on a Penal Statute ought expreſsly to ſhew, that the Defendant is not within any of its Proviſoes; for ſince no [e] Plea can be admitted to ſuch a Conviction, and the Defendant can have no Remedy againſt it, but from an Exception to ſome Defect appearing in the Face of it, and all the Proceedings are in a ſummary Manner, it is but reaſonable that ſuch a Conviction ſhould have the higheſt Certainty, and ſatisfy the Court, That the Defendant had no ſuch Matter in his Favour as the Statute it ſelf allows him to plead.

[c] Poph. 93, 94. 1 Jon. 157. 1 Lev. 26. Vide Savil 32. pl. 73.

[d] Poph. 93, 94.

[e] Quære 1 Salk. 181, 182.

Sect. 116. It ſeems to be laid down as a general Rule in [f] *Savil's* Report, which is alſo confirmed by the Year-Book of 11 *H.* 4. 14. That if the Statute whereon an Indictment is grounded be particularly recited; the general Concluſion, *contra formam Statuti*, after the Allegation of the Fact, will ſupply an Omiſſion in it of a Circumſtance mentioned in the Statute, which would be fatal without ſuch a Recital and Concluſion; for ſince the Statute is particularly recited, and the Defendant charg'd with having done the Offence againſt the Form of it; and it is impoſſible that he could ſo have done, if any Circumſtance expreſsly requir'd by the Statute had been wanting; it ſeems that the Offence may properly enough be ſaid to be as fully ſet forth in the very Words of the Statute, as if ſuch Words had been repeated in the Allegation of the Offence, according to the common Rule, that *Verba relata hoc maximè operantur per referentiam ut ineſſe videantur.* Neither do I find this contradicted by any of the Reſolutions in the precedent Sections; for it does not appear that there was ſuch a Recital and Concluſion in any of the Indictments therein referr'd to. Yet notwithſtanding the Omiſſion of a Circumſtance mentioned in a Statute, may perhaps in ſuch Manner be holpen; it ſeems that the Want of a certain Deſcription of the Time or Place, or Things or Perſons concerned, or of the Concluſion *contra pacem*, or of an expreſs and direct Allegation of the Fact it ſelf, cannot be ſo ſupply'd; for ſuch Omiſſions [g] viciate an Indictment drawn in the very Words of the Act.

[f] Savil 33. pl. 78. Vide ſupra, ch. 23. Sec. 63. 2 Ro. Rep. 227. S.P.C. 81. C.

[g] 2 Rol. Rep. 226. *ſeems contrary.*

Sect.

Sect. 117. As to the fourth Particular, *viz.* Whether an Indictment grounded on a Statute which will not maintain it, may be made good as an Indictment at Common Law; it seems formerly to have been [b] generally taken for granted, That no Indictment whatsoever which is grounded on a Statute, and concludes *contra formam Statuti*, and cannot be made good by any Statute, can be maintained as an Indictment of an Offence at Common Law; the chief Reason whereof seems to be this, That it appears that the Prosecution is intended to be grounded on a Foundation which will not support it. But the contrary seems to have been adjudged in [c] *Page*'s Case, wherein it was resolved, That if Persons be indicted specially on the Statute of Stabbing, and the Evidence be not sufficient to bring them within the Statute, they may be found guilty of general Manslaughter at Common Law, and that the Words *contra formam Statuti* shall be rejected as Senseless, where the Offence is prohibited by the Common Law only. And the same hath been since [d] adjudged as to other Statutes; and as I took it, was lately agreed in an Information against the City of [e] *Norwich*.

Sect. 118. As to the fifth Particular, *viz.* How far it is necessary for an Indictment on a Statute, to conclude *contra formam Statuti*, it seems that Judgment on a Statute shall in no Case be given on an Indictment, which doth not so conclude; for granting that such Judgment may in some Cases be given in an Action brought at Common Law, without Reference to any Statute, as it is [f] said, That Judgment on 8 *H.* 6 9. may be given on the old Common Law Writ of Assise of Novel Disseisin, yet it will not follow, That such a Judgment can in any Case be given on an Indictment drawn as for an Offence at Common Law without any Reference to Statute. For as to the said Case of an Assise of Novel Disseisin, it may be said that the Statute of 8 *H.* 6. expresly says, That the Party may recover by such Writ; and therefore since there is no special Writ of this Kind formed upon the Statute, and the Party has [g] no Authority to make out a Writ himself in a new Form, it is reasonable that he may recover by the old Writ. But it [h] seems that Judgment on this Statute cannot be given on an Action of Trespass in the Common Law Form, because there is a special Writ of Trespass in the [i] Register grounded on the Statute; and it seems to be [k] agreed, That where there is a special Writ grounded on a Statute, Judgment shall never be given on such a Statute in an Action brought at Common Law. And in like Manner, since every one who prosecutes an Indictment is at Liberty to draw it as he pleases, so that he observes the general Rules of Law concerning Indictments; it seems to be [l] taken as a common Ground, That a Judgment by Statute shall never be given on an Indictment at Common Law, as every Indictment which doth not conclude *contra formam Statuti*, shall be taken to be. And therefore [m] if an Indictment do not conclude *contra formam Statuti*, and the Offence indicted be only prohibited by Statute and not by Common Law, it is wholly insufficient, and no Judgment at all can be given upon it: But if the Offence were also an Offence at Common Law, I take it to be in a great Measure settled at this Day, That [n] Judgment may be given as for an Offence at Common Law, tho' the Indictment conclude *contra formam Statuti*, as hath been more fully shewn in the precedent Section.

[b] Cro. El. 231. pl. 23. Cro. El. 307. pl. 10. Cro. El. 697. pl. 10. 2 Leon. 188. Noy. 71, 172. 5 Co. 99. 2 Ro. Re. 263. Cro. Ca. 465. 2 Keb. 36. pl. 73. 2 Keb. 566. pl. 70. Vide 6 Mod. 17. *the same may be collected from* 2 Rol. Ab. 82. pl. 2, 3. *and* 1 Jon. 379.

[c] H. P. C. 58. Aleyn. 43, 44. B. 1 Ch. 30. Sect. 9.

[d] 1 Sid. 420. 2 Keb. 138. pl. 5. Vide 1 Salk. 212.

[e] *The King against the City of* Norwich, *adjudged* Hilar. 5. Georgii.

[f] 9 H. 6. 2. pl. 5. Bro. Action sur le Statute 6.

[g] 2 Inst. 407.

[h] Vide 2 Inst. 200. Bro. Parliament 75.

[i] Register 289. a.

[k] 9 H. 6. 2. pl. 5. 56. pl. 42. 19 H. 6. 54. b. 47 Ed. 3. 10. pl. 7. 8 H. 4. 13. b. 2 Ed. 4. 9. pl. 5. Bro. Action sur le Statute 6, 10. Parliam. 75. Fitz. Judgment 10. Cessavit 18. Attachment sur Prohibition 1, 3.

[l] Bendloe 57. pl. 92. Cro. El. 759, 760. Re. 38. 1 Saund. 249. 1 Sid. 409. 2 Keb. 506. pl. 79. 1 Salk. 370. pl. 3. *See the Authorities cited to the other Parts of this Section.*

[m] 2 Rol. 2 Keb. 477. pl. 7. 1 Sid. 409. 1 Saund. 249, 250. 9 H. 6. 56. pl. 42. Fitz. Attachment sur Prohibition 1, 3. But 2 Rol. Ab. 82. pl. 2, 3. 2 Keb. 566. pl. 70. 1 Jo. 379, 380. *seem contrary.*

[n] *See the precedent Section.*

Sect.

Sect. 119. If there be more than one Statute concerning the ſame Offence, and the firſt of them were never diſcontinued, and the later [a] only continue the former without making any Addition to it; or only [b] qualify the Method of Proceeding upon it, without altering the Subſtance of its Purview; it ſeems agreed, That it is ſafe in an Indictment on any ſuch Statute to conclude *contra formam Statuti*; and it hath been [c] holden, That a Concluſion *contra formam Statutorum*, will in ſuch Caſes vitiate the Proſecution; but where a Statute hath been wholly diſcontinued, and is afterwards reviv'd, there [d] ſeem to have been ſome Opinions, That a Proſecution on it ought to conclude *contra formam Statutorum*. Alſo where the ſame Offence is prohibited by ſeveral independent Statutes there are ſome [e] Authorities, that you muſt either conclude *contra formam Statutorum*, or *contra formam* of the particular Statutes naming them, and that if you barely conclude *contra formam Statuti*, the Indictment will be inſufficient, for not ſhewing on which of the Statutes it was taken. But there are alſo ſtrong [f] Authorities for the contrary Opinion, which is alſo moſt agreeable to [g] Precedents; to which may be added, That if it be a good Objection to ſuch an Indictment, concluding *contra formam Statuti*, that it appears not on which of the Statutes the Proſecution is grounded, the ſame Objection may as well be made to an Indictment concluding *contra formam Statutorum*; for it no more appears from ſuch a Concluſion on what Statute the Proſecution is grounded, than from the Concluſion *contra formam Statuti*; and yet it ſeems to be [h] generally admitted, That a Concluſion *contra formam Statutorum* is good where the Indictment is for an Offence prohibited by ſeveral Statutes. Alſo where ſuch an Indictment concludes *contra formam Statuti*, without ſhewing what Statute is [i] intended, why may it not be ſaid that ſuch Statute ſhall be taken as is moſt for the King's Advantage, as well as where the Indictment concludes *contra formam Statutorum*, in which Caſe it ſeems to be admitted, that it ſhall be ſo taken. But where a later Statute ordains, That a former Statute ſhall be executed in a new Caſe not mentioned in the former, as 8 *H.* 6. 9. does, that 15 *Ric.* 2. 2. ſhall be executed in the Caſe of a Forcible Detainer, which is not mentioned in 15 *Ric.* 2. or where a new Statute adds a new Penalty to an Offence prohibited by a former Statute, as [k] 23 *Eliz.* doth that of 20*l.* for a Month's Abſence from Church contrary to the Tenor of 1 *Eliz.* it ſeems, that it may with greater Reaſon be argued, That if the Indictment conclude *contra formam Statuti*, it will be [l] inſufficient, becauſe it may ſeem, that the Offence is not puniſhable by any one Statute only. Yet conſidering that the Precedents in theſe Caſes generally conclude *contra formam Statuti*, and the Proſecution in Truth depends on the Addition made by the later Statute, which ſeems of it ſelf alone ſufficient to ſupport it, it may be reaſonably argued, and ſeems agreeable to the later [m] Opinions, That ſuch a Concluſion may be allowed in theſe Caſes alſo. However it ſeems ſafe in any of the Caſes above-mentioned, to conclude *contra formam* [n] *Statut'*, which ſhall ſtand either for *Statuti* or *Statutorum*, or be rejected in ſuch manner as will beſt maintain the Indictment.

Sect. 120. As to the ninth general Point of this Chapter, *viz.* What ought to be the Form of the Caption of an Indictment, I ſhall take it for granted, That every ſuch Caption is erroneous, which doth not ſet forth with proper Certainty, both the Court in which, and the Jurors by whom, and alſo the Time and Place at which the Indictment was found; for the better underſtanding whereof I ſhall endeavour to ſhew what Certainty of this Kind is neceſſary,

1. In

[a] Cro. El. 750. pl. 6. Owen 135. 1 Lutw. 221.
[b] Yelv. 116. Cro. Jac. 187. pl. 9.
[c] Yelv. 116. *See* Cro. Jac. 187. pl. 9.
[d] Owen 135. 1 Lutw. 221.
[e] Cro. El. 760. pl. 6. 187. pl. 12. 2 Leon. 5. Cro. Jac. 142. pl. 19. Aleyn. 49, 50. 2 Bulſt. 258. Dalt. Ch. 131.
[f] Crompt 104. pl. 49. 5 H. 7. 17. b. Cro. El. 186. pl. 10. 4 Co. 48. a.
[g] Vide 2 Rol. Ab. 79. pl. 3. 82. pl. 5, 6. Dalton Ch. 129. Aleyn 50. B. 1. Ch. 81. Sect. 10.
[h] Dyer 155. pl. 15. Cro. El. 750. pl. 6. Aleyn 49, 50. Lamb. B. 4. Ch. 5.
[i] Dy. 155. pl. 15. 347. pl. 9. 2 Rol. Re. 227. 5 H. 7. 17. b. Owen 135. Supra Sect. 92. Contra 2 Leon. 5. 2 Rol. Re. 65.
[k] Vide Cro. Jac. 142. Cro El. 750. pl. 6. 2 Leon. 5.
[l] Aleyn 49, 50.
[m] Vide 1 Mod. 191. 3 Lev. 61. 1 Lutw. 212.
[n] Aleyn 50 6 Mod. 140.

1. In Reſpect of the Court, before which.
2. Of the Jurors, by whom.
3. Of the Time: And,
4. Of the Place, at which the Indictment was found.

Sect. 121. As to the firſt of theſe Particulars, it is certain, That every ſuch Caption muſt ſhew, that the Indictment was taken before ſuch a Court as had Juriſdiction over the Offence indicted; and therefore if it ſet forth, that any Indictment whatſoever was taken before *J. S.* [a] Steward, without ſhewing to whom he was Steward, or in what Court; or that an Inquiſition of Death, upon View of the Body, was taken before *J. S.* [b] Mayor of *London*, or before *J. S.* Steward to [c] ſuch a Perſon, and in ſuch a Court, without adding, That he was a Coroner; or if it expreſly call him Coroner, but do not alſo ſhew that he was ſuch for the [d] Diſtrict in which the Inquiſition was taken, it is inſufficient But it hath been [e] adjudged, that it is ſufficient to ſet forth, that it was taken before *J. S.* a Coroner in the County, without ſaying, that he was a Coroner for the County, for that cannot but be intended.

Sect. 122. Where [f] the Caption of an Indictment alledges it taken at the General Seſſions of the Peace of ſuch a County, or Burgh, it doth not ſeem neceſſary to add, That ſuch Seſſions was holden for ſuch County, or Burgh, becauſe it could not but be ſo holden, if it were the General Seſſions of ſuch County, or Burgh; but if it had been only deſcribed as a General Seſſions holden in ſuch County, or Burgh, it is ſaid [g] to be a fatal Exception, that it is not expreſly alledged as holden for ſuch County, or Burgh; but [h] *Quære*, if this be not helped by putting the County in the Margin.

Sect. 123. There are ſome [i] Authorities, that if the Caption of an Indictment before Juſtices of Peace take no Notice of their Commiſſion to hear and determine Felonies, *&c.* which is generally done by the Clauſe, *necnon ad diverſas Felonias, &c.* it is inſufficient: But having already more fully conſidered this Matter, *Chap.* 8. *Sect.* 33. I ſhall refer the Reader to what is there ſaid concerning it.

Sect. 124. There are alſo ſeveral Authorities, that the Caption of an Indictment before Juſtices of Peace is inſufficient, unleſs either the Words [k] *Domini Regis*, or [l] *Publicæ*, be added after *Pacis*; and it hath been ſometimes holden, That even the Words *Domini Regis*, are not ſufficient without the Word [m] *nunc*, or ſome other, to ſhew whether it were the Peace of the preſent King, or of ſome of his Predeceſſors. And the chief Ground of theſe Opinions ſeems to be the Statute of 27 *H.* 8. 24. *Sect.* 4. by which it is enacted, *That in every Writ and Indictment that ſhall be made within any County-Palatine, or Liberty, whereby any Thing ſhall be ſuppoſed to be done againſt the King's Peace, it ſhall be ſuppoſed to be done againſt the King's Peace, his Heirs and Succeſſors, and not againſt the Peace of any other Perſon whatſoever, any Statute, Grant, or Uſage, to the Contrary notwithſtanding.* From whence, I ſuppoſe, it may have been collected, that by Parity of Reaſon, Juſtices of Peace ought to be ſtyled, in legal Proceedings, Juſtices of the King's Peace, that it may appear that the Peace of no other Perſon, but of the King, is intended. But ſince this is not expreſly required by the ſaid Statute; and it cannot but be intended, (eſpecially at this [n] Day, when none but the King can appoint Juſtices of Peace) that all Juſtices of Peace muſt be Juſtices of the publick Peace, or of the King's Peace, which is the ſame Thing; and accordingly Exceptions for the want of

[a] 22 Ed. 4. 19. b. Bro. Battail 7. Indictment 46
[b] 22 Ed. 4. 13. a. H. P. C. 207. S.P.C. 96. F.
[c] 22 Ed. 4. 12. b.
[d] Cro. Eliz. 193. pl. 7. 2 Ro Rep. 82.
[e] 22 Ed. 4 19 b. Bro. Bat. 7. Indictment 46.
[f] Pl com 97. a. 76. b. 4 Co. 41. b.
[g] 1 Sid. 247. pl. 11. 1 Keb. 329. pl. 66, 668. pl. 59. 1 Lev. 304. 2 Keb. 133. pl. 99. 2 Keb. 128. pl. 83, 141. pl. 11. 1 Keb. 635. pl. 126. *ſeems contrary.*
[h] Cro. Eliz. 490.
[i] S. P. C. 96. Letter E. H P. C. 207. 2 Keb. 160. pl 46. Bro. Indictment 32. *But this is left as a Query,* 22 Ed. 4. 12. b. 13. a. Bro. Error. 186. *See* Bro. Indictment. 50.
[k] 1 Lev. 175. 2 Keb. 647. pl. 84. 1 Sid. 247. pl. 11, 422. pl. 13.
[l] 1 Keb. 37. pl. 101. 1 Sid. 422. pl. 13.
[m] 1 Sid. 422. pl. 13. 2 Keb. 582. pl. 117.
[n] Vide Ch 5. Sect. 1.

these Words have been often [a] over-ruled; I take them to be obsolete at this Day, as it seemed to be lately settled between the [b] King and *Hawkins* on a Conviction of Deer-stealing.

Sect. 125. But it seems generally agreed, [c] That if the Caption of an Indictment, at a Sessions of the Peace, do not mention before whom it was holden, or if it set it forth [d] generally as holden before Justices, without shewing any Thing of the Nature of their Commission, or as holden before Justices [e] of the Peace, *&c.* without naming any of them, or shewing for what Place they were Justices, or if it [f] describe them as Justices *ad pacem in comitatu prædict. conservand'*, omitting the Word *assignat'*, it is insufficient. [g] Yet it hath been adjudged, That it is not necessary for the Caption of an Indictment taken at a General Sessions of the Peace, to style any of the Justices of the *Quorum*, because it sufficiently shews, that one or more of them were such by shewing, That the Sessions was a General one.

Sect. 126. It hath been adjudged, [h] That the Caption of an Indictment, setting it forth as taken *ad magnam curiam cum leta tentam*, is insufficient; the chief Reason whereof seems to be this, That such a Caption rather imports, that the Indictment was taken at the Court which had no Jurisdiction to take it, than at the proper one; for it seems to be express, that it was taken at the Court-Baron, and mentions nothing in Relation to the Court-Leet, but that it was holden together with the Court-Baron. And agreeably hereto it is said in the Year-Book of 10 *Edw.* 4. 15. That if the Caption had been *ad magnam Curiam & ad letam*, it had been some Sense, but that *cum leta* bears no Sense. From whence it may be argued, That if a Caption set forth an Indictment as taken at a Court-Baron and Court-Leet, it may be good, because the Court-Baron having no Manner of Jurisdiction in criminal Matters, and the Court-Leet having such Jurisdiction, it may well be [i] intended that the Indictment was taken at the Court-Leet, and not at the Court which had nothing to do with it. *A fortiori* therefore, if an Indictment be set forth as taken *ad vis. franci pleg. cum cur' baron' tent'*, it shall be intended to have been taken at the Court-Leet; as it is [k] said to have been holden by the late Chief Justice *Holt*, who yet seemed to be of Opinion, That if a Court-Baron had a Jurisdiction of such Matters as well as a Court-Leet, but in a different Manner, such a Caption would have been insufficient, for not shewing more expressly at which of the Courts the Indictment was taken.

Sect. 127. It hath been adjudged, [l] That the not setting forth in the Caption of an Indictment taken at a Leet, whether the Court were holden by Grant or Prescription, is holpen by the Multitude of Precedents.

Sect. 128. As to the second Particular, *viz.* What Certainty is necessary in the Caption of an Indictment in respect of the Jurors by whom it was found, it seems agreed, That no Caption of an Indictment whether found at a [m] Court-Leet, or other inferior Court, can be good, without expressly shewing, that the Jurors who found it were of the [n] County, City, or Burgh, or other Precinct, for which the Court was holden, and that they were at least [o] twelve in Number, and [p] also, that they found the Indictment upon their Oaths. Also, Indictments have been [q] quashed for an Omission of the Names of the Jurors in the Caption; but there is a [r] Precedent in *Saunders*'s Reports of a Caption, setting forth,

[a] 2 Keb. 385 pl. 58. 1 Sid. 247. pl. 11. *It is made a Query*, 1 Keb. 656. pl. 36. 1 Sid. 175. pl. 7.
[b] *Adjudged* Term. Mich. 3 Georgii.
[c] 1 Mod. 24. 2 Keb. 580. pl. 112. Cro. Eliz. 738. pl. 10.
[d] 1 Bulst. 203.
[e] 2 Keb. 128. pl. 83. Cro. Eliz. 738. pl. 10. Vide Keilw. 192. b. 194. a. 2 Keb. 385. pl. 58. 22 Ed. 4, 19. b. Bro. Battail 7. Indictment 46.
[f] 1 Saund. 263.
[g] 1 Sid. 367. 3 Mod. 152. 2 Keb. 366. pl. 19.
[h] 10 Ed. 4. 15. pl. 15. Bro. Indictment 34. Fitz. Indictment 20. S. P. C. 95. Letter C. H. P. C. 206. 2 Keb. 139. pl. 7.
[i] 1 Salk. 195. Supra Ch. 11. Sect. 6.
[k] 1 Salk. 195.
[l] 1 Salk. 200.
[m] 6 H. 4. pl. 4.
[n] Raym. 434. Cro. Eliz. 677. pl. 6. 2 Keb. 160. pl. 46. 3 Keb. 807. pl. 17. Vide Supra Sect. 33
[o] Cro. Eliz. 654. pl. 16. Vide Supra Sect. 15. 6 H. 4. pl. 4. 41 Ed. 3. 31. pl. 36.
[p] 2 Keb. 676. pl. 54. 1 Sid. 140. 3 Mod. 201. 1 Keb. 629. pl. 112, 329. pl. 66. *See the Cases cited to Letters* a, b, c, d, e, f, g. *and* 1 Salk. 371. pl. 7.
[q] 2 Rol. Ab. 82. pl. 10. 2 Keb. 470. pl. 61. 6 H. 4. pl. 4. Qu. 2 R. 3. 11. pl. 25. Vide Rast. Ent. 553, 606.
[r] 1 Saund. 249. Vide 13 H. 7. 20. a. 2 Keb. 366.

forth, That the Indictment was taken by twelve Men, *&c.* without naming them, and yet no Exception appears to have been taken on this Account. Alſo, many Indictments taken in inferior [a] Courts, have been quaſhed for want of the Words, *proborum & legalium hominum* in the Caption, but this Exception hath been often over-ruled, as hath been more fully ſhewn in the ſixteenth Section of this Chapter. Alſo, many Indictments in ſuch Courts have been quaſhed for want of the Words, [b] *jurat. & onerat.* in the Caption; and alſo for want of the Words [c] *adtunc & ibidem*, before the Words *jurat. & onerat'*; and alſo for [d] want of the Words *ad inquirendum pro dicto Domino Rege & pro corpore comitatus*; and alſo for want of the Words [e] *ſuper ſacramentum ſuum dicunt*, after the Words *jurat. & onerat'*; and alſo for expreſſing the [f] Oath to have been to inquire *pro corpore civitatis prædictæ*, where the Offence aroſe in, and the Seſſions was holden for a Burgh, *&c.* But it is [g] ſaid, That in the Caption of an Indictment taken in the King's Bench, or at the [h] Grand Seſſions, the Words *ſuper ſacramentum ſuum dicunt*, ſupply the Want of the Words *jurat. & onerat'*, *&c.* Alſo, it is ſaid to have been [i] adjudged, That the Words *jurat. & onerat. ad inquirend. pro Domino Rege & corpore comitatus* are ſufficient, without the Word *pro* before *corpore*; and that the Addition of the Words *ad largum* after *inquirend.* does no [k] hurt; and that there is no need of the Words *ad inquirendum pro corpore comitatus* in an [l] Inquiſition taken for a particular Purpoſe; and that the Omiſſion of the Word [m] *onerat.* is not fatal, if there be the Word *jurat'*, for that fully implies it.

Sect. 129. As to the third Particular, *viz.* What Certainty is neceſſary in the Caption of an Indictment, in reſpect of the Time when it was found? It ſeems [n] agreed, That ſuch Caption muſt ſet forth a certain Day and Year when the Court was holden, before which the Indictment was found, and muſt record it as then found in the [o] Preſent Tenſe, and not in the Preterperfect; for it hath been [p] adjudged, That if it deſcribe the Seſſions at which the Indictment was taken, as holden *die Martis & die Mercurii*; or as holden on ſuch a Day in ſuch a Year of the King, without [q] aſcertaining what King; or if it ſet forth the Style of the Day or Year in any [r] Figures but *Roman*, it is inſufficient. But it ſeems to be [s] agreed, That it is ſufficient to expreſs the Year of the King, without adding that of the Lord: Alſo it ſeems, that [t] *extitit præſentatum* for *exiſtit* is made good by the Multitude of Precedents.

Sect. 130. As to the fourth Particular, *viz.* What Certainty is neceſſary in the Caption of an Indictment in reſpect of the Place where it was found? It ſeems agreed, That if ſuch Caption either ſet forth no [u] Place at all where the Indictment was found, or do not [x] ſhew with ſufficient Certainty, that the Place ſet forth is within the Juriſdiction of the Court before which it was taken, as where it ſets forth the Indictment as taken at a Seſſions of the Peace holden for ſuch a County, at *B.* [y] without ſhewing in what County *B.* is, otherwiſe than by putting the County into the Margin, it is inſufficient: Alſo, if an Act of Parliament, whether it be in Print, or not, appoint, that the Quarter-Seſſions of ſuch a County ſhall be holden at ſuch a Place only, and not elſewhere, except for Cauſe of the Plague, *&c.* it ſeems, [z] that the Caption of every Indictment taken at any ſuch Seſſions, is inſufficient, unleſs it expreſly ſhew, that it was holden at ſuch Place. But it hath been * adjudged, That the Cap-

[a] 1 Keb. 629. pl. 112. 2 Keb. 471. pl. 63. 2 Rol. Abr. 82. pl. 8. [b] 2 Keb. 366. pl. 19. [c] 1 Keb. 101. pl. 100, 524. [d] pl. 14, 629. pl. 112, 852. [e] pl. 55. [f] 2 Keb. 367. pl. 20. [g] Vide 3 Keb. 128 pl. 50. Contra 2 Keb. 59 pl. 28. [h] 2 Jo. 180. [i] 1 Mod. 26. [k] 2 Keb. 583. pl. 121, 610. [l] pl. 47. [m] 2 Keb 471. pl. 63. Show. 272. 6 Mod. 95, 180. [n] 1 Sid. 140. 1 Keb. 498. pl. 51. [o] 1 Saund. 249. [p] 1 Keb 629 pl. 112 [q] 2 Keb 471. pl. 63. [r] 6 Mod. 180. [s] 1 Sid 140. [t] Show. 272. 6 Mod. 95. [u] Dom. Rex verſus Gravenor, *adjudg'd* Hil. 3 Georg. [x] Vide 1 Bulſt. 203. Supra Ch. 10. Sect. 9. [y] 1 Sid. 229, 230 1 Keb. 37. pl. 101, 823. pl. 114. Vide 1 Mod. 81. [z] 2 Saund 393. 1 Vent. 170. * 4 Co. 48. a. [q] 2 Keb 582. pl. 117, 118. [r] Vide ſupra Sect. 89 1 Mod. 78. 2 Keb. 128. pl. 83. [s] Vide ſupra Sect. 82. & Ch. 23. Sect. 90. [t] 1 Sid. 140, 368. 1 Keb. 37. pl. 101. 2 Keb. 367. pl. 20. 5 Co. 120. Fitz. Indictment 20. Bro. Indictment 34. 10 Ed. 4. 15. pl. 15. [u] Dyer 69. pl. 29. [x] Cro. Jac. 276, 277. [y] Cro. Eliz. 137. pl. 9, 606. pl. 4, 738. pl. 10, 751. pl. 7. [z] Dyer 135. pl. 14. * 5 Co. 120. b. 121. Vide Poph. 208. Cro. Eliz 490.

tion of an Inquiſition as taken at *B.* before *J. S.* Coroner of the King's Liberty of *B.* aforeſaid, is good, without expreſly ſhewing that *B.* is within the Liberty of *B.* for it cannot but be intended.

Sect. 131. As to the tenth general Point of this Chapter, *viz.* Upon what Proof, and within what Time after the Offence, an Indictment may be found? It [a] ſeems, that before 1 *Ed.* 6. no certain Number of Witneſſes was required upon the Indictment or Trial of any Crime whatever; for it ſeems to be generally [b] agreed, that the Statutes of 1 and 2 of *Philip* and *Mary*, 10 & 11, in reſtoring the Order of Trial by the Courſe of the Common Law, took away the Neceſſity of two Witneſſes in all Caſes within thoſe Statutes; from whence it plainly ſeems to follow, that they were not required by the Common Law. It is holden [c] indeed by ſome, That by the ancient Common Law one Witneſs was not ſufficient to convict any Perſon of High Treaſon, and this is ſaid to be grounded on the Law of God, expreſſed both in the Old and New Teſtament. But granting that one Witneſs was not ſufficient for a Conviction, it doth not follow but that he might be ſufficient for an Indictment. Alſo, however the Law might have ſtood in Relation to theſe Matters before the Conqueſt, it ſeems to have been wholly altered long before the Statute of *Ed.* 6. And I rather incline to this Opinion, ſince I find it ſo little ſupported by the Generality of the Authorities cited by Sir *Edward Coke* for the Proof of the contrary, which wholly relate either to the Proof of an Eſſoin, or of a Summons [d] in a real Action, or [e] of the Default of Perſons ſummon'd on a Jury, or [f] other Matters rather leſs to the Point. And as to the abovecited Paſſages of Scripture it may be anſwered, that thoſe in the Old Teſtament concern only the judicial Part of the *Jewiſh* Law, which being framed for the particular Government of the *Jewiſh* Nation, doth not bind us any more than the ceremonial; and that thoſe in the New Teſtament contain only prudential Rules for the Direction of the Government of the Church, in Matters introduced by the Goſpel, and no way control the Civil Conſtitutions of Countries. To which may be added, That whatſoever may be ſaid either from Reaſon or Scripture for the Neceſſity of two Witneſſes in Treaſon, holds as ſtrongly in other Capital Cauſes, and yet it is not pretended, that there is or ever was any ſuch Neceſſity in relation to any other Crime but Treaſon.

[a] Vide 3 Keb. 68. pl. 7. Bro. coro. 220. 2 Jo. 233.
[b] Bro. coro. 220. S.P.C. 164. Dyer 132. pl. 75. 1 Jon. 233. Kel. 18, 49. Vide 3 Inſt. 24, 25, 26. H.P.C. 208, 262.
[c] 3 Inſt. 26. Raym. 408.
[d] Bract. 354. b.
[e] 35 H. 6. 46. b. 47 a.
[f] 48 Ed. 3. 30. pl. 17.
[g] 15 Ed. 4. 1.

Sect. 132. But it is enacted by 1 *Ed.* 6. 12. *par.* 22. *That no Perſon or Perſons, after the firſt Day of* February *then next to come, ſhall be indicted, arraigned, condemned, or convicted for any Offence of Treaſon, Petit Treaſon, or Miſpriſion of Treaſon,* &c. *unleſs the ſame Offender or Offenders, be accuſed by two ſufficient and lawful Witneſſes, or ſhall willingly without Violence confeſs the ſame.*

Sect. 133. Alſo it is further enacted by 5 & 6 *Ed.* 6. 11. *par.* 8. *That no Perſon or Perſons after the firſt Day of* June *then next coming, ſhall be indicted, arraigned, condemned, convicted or attainted, for any of the Treaſons in the Act mentioned, or for any other Treaſons that then were, or after ſhould be, which ſhould after be perpetrated, committed or done, unleſs the ſame Offender or Offenders, be thereof accuſed by two lawful Accuſers; which ſaid Accuſers at the Time of that Arraignment of the Party accuſed, if they be then living, ſhall be brought in Perſon before the Party ſo accuſed, and avow and maintain what they have to ſay againſt the ſaid Party, to prove him guilty of the Treaſons or Offences contained in the Bill of Indictment laid againſt the Party arraigned, unleſs the ſaid Party arraigned ſhall willingly, without Violence, confeſs the ſame.*

Sect. 134. But it is enacted by 1 & 2 *Ph. & M.* 10. *That all Trials after that Statute to be had, awarded, or made for any Treason, shall be had and used only according to the due Order and Course of the Common Law.*

Sect. 135. Also it is enacted by 1 & 2 *Ph. & Ma.* 11. *That all and every Person and Persons who shall be accused or impeached of any of the Offences contained in that Statute, or of any other Offence or Offences concerning the impairing, counterfeiting or forging of any Coin Current within this Realm, shall and may be indicted, arraigned, tried, convicted or attainted by such like Evidence, and in such Manner and Form as has been used and accustomed within the Realm, at any Time before the first Year of the Reign of King* Edward 6.

Sect. 136. It is further enacted by 7 *W.* 3. 3. *That after the 25th Day of* March, *in the Year* 1696, *no Person or Persons whatsoever shall be indicted, tried, or attainted of High Treason, whereby any Corruption of Blood may, or shall be made to any such Offender or Offenders, or to any the Heir or Heirs of any such Offender or Offenders, or of Misprision of such Treason, but by and upon the Oaths and Testimony of two lawful Witnesses, either both of them to the same Overt Act, or one of them to one, and the other of them to another Overt Act of the same Treason, unless the Party indicted and arraigned, or tried, shall willingly, without Violence, in open Court, confess the same, or shall stand Mute, or refuse to plead; or in Cases of High Treason, shall peremptorily challenge above the Number of thirty-five of the Jury.*

Sect. 137. And it is further enacted by the said Statute, *That no Person or Persons whatsoever, (such only excepted as shall be guilty of designing, endeavouring, or attempting any Assassination on the Body of the King, by Poison, or otherwise,) shall be indicted, tried, or prosecuted for any such Treason as aforesaid, or for Misprision of such Treason, that shall be committed or done within the Kingdom of* England, *Dominion of* Wales, *or Town of* Berwick *upon* Tweed, *unless the same Indictment be found by a Grand Jury, within three Years next after the Treason or Offence done and committed.*

Sect. 138. But it is provided, *That nothing in this Act shall any Ways extend to any Impeachment, or other Proceedings in Parliament, nor to any Indictment of High Treason, nor to any Proceeding thereupon, for counterfeiting his Majesty's Coin, his Great Seal, or Privy Seal, his Sign Manual, or Privy Signet.*

Upon these Statutes the following Particulars seem most remarkable.

Sect. 139. *First*, That where the Statute of 1 *Ed.* 6. requires, That the Party be accused by two lawful Witnesses; and that of 5 & 6 *Ed.* 6. That he be accused by two lawful Accusers; they both mean the very [a] same Thing, because the Common Law admits of no other Accusers but Witnesses.

[a] Bro. coro. 220.

Sect. 140. *Secondly*, That according to the general [b] Opinion, it is not required either by the 1st, or 5th and 6th *Ed.* 6. That such Accusers or Witnesses be present with the Indictors in Person, but that they may send their Accusation to the Indictors in Writing under their Hands, which will be sufficient even after their Death. Also it is observable, That the Books which speak of this Matter do not expressly say, that such Accusation must be upon Oath, but surely this cannot but be intended; for how can any Accuser be said to be a lawful Witness, if he be not upon his Oath? But this is cleared by 7 *W.* 3. as to the Treasons within that Statute; for it expressly provides, That no Person shall be indicted thereof, but by and upon the Oaths and Testimony of two lawful Witnesses.

3 Inst. 25, 26. H. P. C. 208.

[b] S P.C. 164. Bro. coro. 220. H.P.C. 208. *But* 3 Inst. 25, 26. *seems contrary.*

[a] 3 Inst. 25, 26.
[b] H.P.C. 208. Contra Dyer 99. pl. 68. Vide S. P. C. 164. Bro. coro. 220.

Sect. 141. *Thirdly*, By the Judgment both of [a] *Coke* and [b] *Hale*, one who can only witness by Hearsay what he has heard a good Witness say, is not a lawful Accuser within any of these Statutes; for if this were to be allowed, nothing would be more easy than in any Case, where there is one Witness, to get a second, which would totally elude the Provision of the Statutes in requiring two lawful Witnesses, *&c.*

[c] 2 And. 66, 67. 3 Inst. 25.

Sect. 142. *Fourthly*, That the Words, *unless the Party shall willingly, without Violence, confess the same*, in the 1st, and 5th, and 6th *Ed.* 6. are to be understood [c] where the Party accused upon his Examination, before his Arraignment, willingly confesses the same without Torture: But it is observable, that 7 *W.* 3. is thus expressed, *Unless the Party indicted and arraigned, or tried, shall willingly, without Violence, in open Court confess the same.*

[d] Raym. 407, 408. Kel. 9.

Sect. 143. *Fifthly*, That one Witness to one, and another Witness to another Overt Act of the very same [d] Treason, have been construed to be sufficient, within the Statutes of the 1st, and 5th, and 6th *Ed.* 6. and the express Words of 7 *W.* 3. are agreeable hereto.

[e] S.P.C. 90, 164. 3 Inst. 24, 25, 26, 27. Bro. coro. 220.

Sect. 144. *Sixthly*, That the Statute of 1 *&* 2 *Ph. & Ma.* 10. by enacting, That all Trials of Treason shall from thenceforth be according to the Course of the Common Law, doth not [e] take away the Necessity of two Witnesses upon an Indictment, required by the 1st, and 5th, and 6th *Ed.* 6. because the Indictment is no Part of the Trial, but is more properly the Accusation to be tried.

[f] Bro. coro. 220. 3 Inst. 24.

Sect. 145. *Seventhly*, [f] That the said Statute of 1 *&* 2 *Ph. & Ma.* doth not extend to Misprision of Treason; but this is expressly provided for by 7 *W.* 3. as to such Treasons as are within that Statute, and therefore there must be two Witnesses to the Indictment, as well as Trial of every such Misprision.

[g] Bro. coro. 220. 3 Inst. 24.

Sect. 146. *Eighthly*, That [g] Petit Treason is within the 1st, and 5th, and 6th of *Ed.* 6. and 1 *&* 2 *Ph. & Ma.* 10. but not within the 7th of *W.* 3. from whence it follows, That two Witnesses are required to the Indictment, and not to the Trial of it, and that two Witnesses are not necessary even upon the Indictment, if [h] the Party, upon his Examination, confess it.

[h] Vide supra Sect. 140.

[i] 2 Jo. 233. Vide Bro. coro 220. 3 Keb. 68. pl. 7.

Sect. 147. *Ninthly*, That the Statute of 1 *&* 2 *Ph. & Ma.* 11. which enacts, That all Persons accused of any Offences concerning the impairing, counterfeiting, or forging the Coin, shall be indicted and tried as at the Common Law, hath been construed [i] to extend to clipping, and all other Offences in impairing the Coin, which have been made Treasons since the said Statute of 1 *&* 2 *Ph. & Ma.* From whence it may be probably argued, That the Statute of 7 *W.* 3. by expressly providing, that nothing therein shall extend to High Treason for counterfeiting the Coin; intended in like Manner, that it should not extend to any other High Treason concerning the Coin.

[k] State Trials Volume 4. Page 135. 1 Sid. 54. pl. 19, 247. pl. 11. 2 Keb. 128. pl. 83. 2 Keb. 45. pl 120. Cro Car. 584. Palm. 389. Salk, 372. pl. 11. State Trials Volume 4. Page 134.

Sect. 148. As to the eleventh general Point of this Chapter, *viz.* In what Cases an Indictment may be quashed. I take it to be [k] settled, That by the Common Law the Court may, in Discretion, quash any Indictment, for any such Insufficiency, either in the Caption, or Body of it, as will make any Judgment whatsoever, given upon any Part of it against the Defendant, erroneous; yet it seems, That Judges are in no Case bound, *ex debito justitiæ*, to quash an Indictment, but may oblige the Defendant either to plead or demur to it: And this they generally do where it is for a Crime of an enormous or publick Nature, as Perjury, Forgery, Sedition, Nusances to the Highways, and other Offences of the like

like Nature. [a] Neither will the Court quash an Indictment removed by *Certiorari*, if a Recognizance for the Trial of it hath been forfeited.

[a] Salk. 380. pl. 26.

Sect. 149. Also it is enacted by 7 *W.* 3. 3. *That no Indictment for High Treason, or Misprision thereof, (except only Indictments for counterfeiting the King's Coin, Seal, Sign, or Signet,) nor any Process or Return thereupon, shall be quashed on the Motion of the Prisoner, or his Counsel, for miswriting, misspelling, false or improper* Latin, *unless Exception concerning the same be taken and made in the respective Court, where such Trial shall be, by the Prisoner, or his Counsel assigned, before any Evidence given in open Court upon such Indictment; nor shall any such miswriting, misspelling, false or improper* Latin, *after Conviction on such Indictment, be any Cause to stay or arrest Judgment thereupon: But nevertheless, any Judgment given upon such Indictment, shall and may be liable to be reversed upon a Writ of Error, in the same Manner, and no other than as if this Act had not been made.*

Sect. 150. It hath been settled * in the Construction of this Statute, that no such Exception can be taken, after Plea pleaded.

* State Trials Volume 4. Page 135, 329.

Sect. 151. It is said [b] in *Siderfin*'s Reports, That the Court never [c] quasheth an Information exhibited by a Common Person, but that it will quash an Information exhibited by the Attorney General, or by the Master of the Crown-Office, upon Motion, if there be Cause: But this was denied in one [d] *Nixon*'s Case, wherein the Court seemed to be agreed, That they never have, or will quash any Information whatsoever.

[b] 1 Sid. 152. Vide 1 Sid. 54. pl. 19.
[c] Contra 1 Keb. 255. pl. 28.
[d] King *versus* Nixon, Trin. 5 Georgii. Vide Salk. 372. pl. 11.

Sect. 152. As to the twelfth general Point of this Chapter, *viz.* What may be pleaded to an Indictment, and in what Manner? Having already shewn in this Chapter how a Defendant may plead [e] to an Indictment, that the Indictors were returned contrary to the Purview of 11 *H.* 4. 9. And having also [f] shewn, how he may plead a Misnosmer, or wrongful Addition; and intending in the following Part of the Book to shew, how he may plead a former Acquittal, Conviction, or Attainder, or a Pardon, or other special Plea, or the general Issue. I shall in this Place only take Notice, That the Defendant may plead any Plea in Abatement of an Indictment of Felony; and also plead over in Bar, and take [g] the general Issue also, in the same Manner as an Appellee may do, as hath been more fully shewn *Chap.* 23. *Sect.* 126, 135.

[e] Supra Sect. 25.
[f] Supra Sect. 70, 71, 72. Vide Ch. 23. Sect. 102.
[g] Finch. 385. H.P.C. 202, 249, 254.

CHAP. XXVI.

Of Information.

INformations are of two Kinds:

First, Such as are merely the Suit of the King.

Secondly, Such as are partly the Suit of the King, and partly the Suit of the Party.

And

And first, for the better understanding the first of these, I shall endeavour to shew,

First, In what Cases they lie.
Secondly, What ought to be the Form of them.
Thirdly, How the Law concerning them hath been altered by Statute.

Sect. 1. As to the first of these Particulars, *viz.* In what Cases such Informations lie: It hath been holden, That the King shall put no [a] one to answer for a Wrong done principally to another, without an Indictment or Presentment, but that he may do it for a Wrong done principally to himself. But I do not find this Distinction confirmed by Experience, for it is every Day's Practice, agreeable to numberless Precedents, to proceed by way of Information, either in the Name of the Attorney General, or of the Master of the Crown-Office, for Offences of the former Kind, as for [b] Batteries, [c] Cheats, seducing [d] a young Man or Woman from their Parents in order to marry them against their Consent, or for any other wicked Purpose; spiriting [e] away a Child to the Plantations, rescuing [f] Persons from legal Arrests, [g] Perjuries and Subornations thereof, [h] Forgeries, Conspiracies, (whether to accuse [i] an innocent Person, or to impoverish [k] a certain Set of lawful Traders, *&c.* or to [l] procure a Verdict to be unlawfully given, by causing Persons bribed for the Purpose, to be sworn on a *Tales*,) and other such like Crimes done principally to a private Person, as well as for Offences done principally to the King, as for [m] Libels, seditious Words, [n] Riots, false News, [o] Extortions, Nusances, (as in not [p] repairing Highways, or obstructing [q] them, or stopping [r] a Common River, *&c.*) Contempts, as in departing [s] from the Parliament without the King's Licence, disobeying [t] his Writs, uttering [u] Money without his Authority, escaping [x] from a legal Imprisonment on a Prosecution for a Contempt, neglecting to keep Watch and Ward, abusing [y] the King's Commission to the Oppression of the Subject, making a Return to a *Mandamus* of Matters [z] known to be false; and in general, any other Offences against the Publick Good, or against the first and obvious Principles of Justice, and Common Honesty.

Sect. 2. Also it seems, [aa] That of Common Right such an Information, or an Action in the Nature thereof, may be brought for Offences against Statutes, whether they be mentioned by such Statutes or not, unless other Methods of Proceeding be particularly appointed, by which all others are impliedly excluded.

Sect. 3. But I do not [bb] find it any where holden, That such an Information will lie for any capital Crime, or for Misprision of Treason.

Sect. 4. As to the second Particular, *viz.* What ought to be the Form of such Informations? Having already in the Chapter *of Indictments* incidentally shewn the principal Points relating to this Matter, I shall only take Notice in this Place, That seeing an Information differs from an Indictment in little more than this, that the one is found by the Oath of twelve Men, and the other is not so found; but is only the Allega-

[a] Thelo. B. 1. ch. 4. Sect. 9, 10, 11, 12, 13, 14. Finch. 336. Fitz. Action sur le Statute, &c.
[b] *See the Preamble of* 4 & 5 Will. & Ma. infra Sect. 5. Show. 116, 117, 118.
[c] Show. 110, 116, 117.
[d] Sid. 431. Cro. Car. 557, 558. March 52, 53. 3 Keb. 101. 1 Lev. 257. 1 Sid. 387. 5 Mod. 221, 222. 2 Keb. 432. Raym. 473.
[e] Raym. 474.
[f] Raym. 231. Show. 109, 110, 113. Cro. Car. 579.
[g] Raym. 202. 5 Mod. 342.
[h] Show. 111.
[i] Raym. 417.
[k] 1 Sid. 174.
[l] *See the President of such an Information.*
[m] Saund. 300, 301. Raym. 201. Show. 118, 119.
[n] 5 Mod. 459. Cro Car. 252. Show. 106.
[o] Raym. 216.
[p] Raym. 384. Show. 110, 111, 112, 116.
[q] Show. 112, 116.
[r] Show. 114, 118.
[s] Ibid.
[t] Cro. Car. 253.
[u] Raym. 185.
[x] Cro. Car. 209.
[y] Show. 116.
[z] Salk. 374. pl. 16.
[aa] Show. 111, 115, 116, 117. 3 Mod. 117. 2 And. 128. Raft. Ent. 686. b. Vitail. 1. Vide 3 Leon. 237. & supra Ch. 24.
[bb] Vide Show. 109, 110.

tion

tion of the Officer who exhibits it, whatsoever Certainty is requisite in an Indictment, the same at least is necessary also in an Information, and consequently, as all the material Parts of the Crime must be precisely found in the one, so must they be precisely alledged in the other, and not by Way of [a] Argument or Recital. Yet it hath been adjudged, That where an Information of Perjury was drawn in this Manner, *Memorandum quod* A. B. *&c. dat Curiæ hic intelligi & informari quod Termino Sancti Hill. &c. in Rotulis continetur sic, viz.* That such an Action was brought, and a Trial had thereon, *&c. Et quod*, the Defendant, at such Trial, took such an Oath which was false, *&c.* without adding, before such mention of the false Oath; *Et ulterius dat Cur. hic intelligi*; yet, by Reason of the late Precedents the Information is as [b] sufficient, at least after Verdict, as if those Words had been added; and it must be confessed, That this is the most reasonable Construction, for how can it be intended that it could be contained in the Record of the Trial, That such an Oath was taken at it, or that it was false?

[a] Salk. 375.

[b] Raym. 34, 35.

Sect. 5. As to the third Particular, *viz.* How the Law concerning such Informations hath been altered by Statute? it is recited by 4 & 5 *Wil. & Ma.* 18. *That divers malitious and contentious Persons had more of late, than in Times past, procured to be exhibited and prosecuted Informations in their Majesty's Court of King's Bench at* Westminster, *against Persons in all the Counties of* England, *for Trespasses, Batteries, and other Misdemeanors, and after the Parties so informed against had appeared to such Informations, and pleaded to Issue, the Informers had very seldom proceeded any further, whereby the Persons so informed against had been put to great Charges in their Defence; and altho' at the Trials of such Informations Verdicts had been given for them, or a* Nolle Prosequi *entred against them, they had no Remedy for obtaining Costs against such Informers.* And thereupon it is enacted, *That after the first Day of* Easter-Term, *in the Year* 1693, *the Clerk of the Crown, in the said Court of King's Bench, for the Time being, shall not without express Order, to be given by the said Court, in open Court, exhibit, receive, or file any Information for any of the Causes aforesaid, or issue out any Process thereupon, before he shall have taken, or shall have delivered to him a Recognizance from the Person or Persons procuring such Information, to be exhibited with the Place of his, her, or their Abode, Title, or Profession, to be entred to the Person or Persons against whom such Information or Informations, is, or are to be exhibited, in the Penalty of twenty Pounds, that he, she, or they will effectually prosecute such Informations or Information, and abide by, and observe such Orders, as the said Court shall direct; which Recognizance the said Clerk of the Crown, and also every Justice of the Peace of any County, City, Franchise, or Town corporate, (where the Cause of any such Information shall arise,) are, by the said Statute impowered to take: After the taking whereof by the said Clerk of the Crown, or the Receipt thereof, from any Justice of the Peace, the said Clerk of the Crown shall make an Entry thereof upon Record, and shall file a Memorandum thereof in some publick Place in his Office, that all Persons may resort thereunto without Fee; and in case any Person or Persons against whom any Information or Informations for the Causes aforesaid, or any of them, shall be exhibited, shall appear thereunto, and plead to Issue, and that the Prosecutor or Prosecutors of such Information or Informations, shall not at his and their own proper Costs and Charges, within one whole Year next after Issue joined therein, procure the same to be tried; or if upon such Trial a Verdict pass for the Defendant or Defendants, or in Case the same Informer or Informers procure a* Nolle Prosequi *to be entred; then, in any of the said Cases the said Court of King's Bench is authorised to award to the said Defendant or Defendants, his, her, or their Costs, unless the Judge, before whom such In-*

formation shall be tried, shall at the Trial of such Information, in open Court, certify upon Record, That there was a reasonable Cause for exhibiting such Information; and in case the said Informer or Informers shall not within three Months next after the said Costs taxed, and Demand made thereof, pay to the said Defendant or Defendants the said Costs, then the said Defendant and Defendants shall have the Benefit of the said Recognizance, to compel them thereunto.

Sect. 6. But it is provided, *That nothing hereof shall extend, or be construed to extend, to any other Informations than such as shall be exhibited in the Name of their Majesties Coroner, or Attorney, in the Court of King's Bench, for the Time being (commonly called the Master of the Crown Officer.)* From whence it follows, That Informations exhibited by the Attorney General remain as they were at the Common Law.

For the better Understanding this Statute, I shall endeavour to shew,

1. Whether it extend to all Kinds of Informations.
2. In what Cases the Court will order an Information to be filed.
3. How the Party may be relieved against Process issued against him, before any Recognizance given.
4. Where the Defendant shall have Costs.

Sect. 7. As to the first of these Particulars: It seems clear, That this Statute extends to all Informations whatsoever exhibited by the Master of the Crown Office; and tho' it may be objected, That an Information in the [a] Nature of a *Quo Warranto*, being a proper Means to try a Right, is not within the meaning of the Statute, which mentioning *Trespasses, Batteries, and other Misdemeanors*, may be reasonably construed to intend such other Misdemeanors only as are of an inferior Nature, like to those specified, which are generally wrangling and frivolous ones; yet seeing this is a remedial Law, and therefore ought to be largely construed, and such Informations may be as vexatious as any other, and always suppose an Usurpation of some Franchise, and every such Usurpation is certainly a Misdemeanor, it hath been settled that this Statute doth extend to them.

[a] Salk. 376. pl. 19.

Sect. 8. As to the second Particular, *viz.* In what Cases the Court will order an Information to be filed. It seems to have been the general Practice not to make such an Order, without first making a Rule upon the Person complained of to shew Cause to the contrary; which Rule is never granted, but upon Motion made in open Court, and grounded upon Affidavit of some Misdemeanor, which if true, doth either for its Enormity, or dangerous Tendency, or other such like Circumstances, seem proper for the most publick Prosecution. And if the Person upon whom such a Rule is made, having been personally serv'd with it, do not, at the Day given him for that Purpose, give the Court good Satisfaction, by Affidavit, that there is no reasonable Cause for the Prosecution, the Court generally grants the Information; and sometimes upon special Circumstances, will grant it against those who cannot be personally serv'd with such Rule, as if they purposely absent themselves, *&c.*

Sect. 9. But if the Party on whom such a Rule is made, shew to the Court a reasonable Cause against such Prosecution; as that he has been before indicted for the same Cause, and acquitted; or that the Intent of the [b] Prosecution is to try a Civil Right, as the Title to Land, *&c.* which is not yet determined; or that the Complaint is trifling, vexatious, or oppressive; or if he can shew to the Court (in Answer to a Motion for an

[b] Cro. Jac. 212.

n Information, in the Nature of a *Quo Warranto*) that his Right to the ranchiſe, in queſtion, had been already determined on a *Mandamus*; or hat it hath been acquieſced in many Years, without any Diſpute; or hat it depends on the Right of thoſe who voted for him, which hath ot been yet tried; or that the Franchiſe no way concerns the Publick, s all thoſe which relate to the Government of a Corporation, or the lection of Members of Parliament, and Fairs, and Markets, *&c.* are id to do) but is wholly of a private [a] Nature, as a Cony-warren, *&c.* Or that the Election, by which he Claims, is agreeable to Charter; or hat he has never acted under it; the Court will not grant the Infor- nation, unleſs there be ſome particular and extraordinary Circum- ances in the Caſe, the Determination whereof being wholly left to he Diſcretion of the Court, cannot well come under any certain ſtated Rules.

[a] Vide Salk. 374. pl. 15.

Sect. 10. As to the third Particular, *viz.* How the Party may be re- ieved againſt Proceſs iſſued againſt him, before any Recognizance given ccording to the Statute? It ſeems that he may move the Court [b] to ſet it aſide, as having iſſued contrary to the Directions of the Statute.

[b] Salk. 376. pl. 19.

As to the fourth Particular, *viz.* Where the Defendant ſhall have Coſts, I ſhall obſerve,

Sect. 11. *Firſt*, That if the Information be tried at Bar, the Defen- dant can have no Coſts within this Statute; for the Words are, [c] *That the Court is authoriſed to award Coſts*, &c. *unleſs the Judge, before whom the Infor- mation ſhall be tried, ſhall at the Trial, in open Court, certify upon Record, that there was a reaſonable Cauſe for exhibiting ſuch Information.* Which is moſt naturally to be underſtood of a Trial at *Niſi Prius*; and it would be ab- ſurd to ſuppoſe, That the Statute intended that the Juſtices of the King's Bench, at a Trial before themſelves, ſhould make a Certificate to them- ſelves: To which may be added, That where a Cauſe is of ſuch Conſe- quence as to be tried at the Bar, it may reaſonably be intended to be out of the Purview of the Statute, which was chiefly deſigned againſt trifling and vexatious Proſecutions.

[c] Clerk's Caſe.

Sect. 12. *Secondly*, That if there be ſeveral Defendants, and any one of them found guilty, thoſe who are acquitted cannot have [d] Coſts with- in this Statute; and this is agreeable to the Conſtruction made of the Statutes which give Coſts to Defendants in civil Actions, by Force where- of no Defendant, in ſuch like Caſe, could recover Coſts before the Sta- tute of 8 & 9 *Will.* 10.

[d] Salk. 194. pl. 5.

Sect. 13. *Thirdly*, That it hath been adjudged in the Conſtruction of thoſe Words, *The Court of King's Bench is authorized to award to the Defen- dant his Coſts, where the Judge, who tries an Information, does not at ſuch Trial certify, That there was a reaſonable Cauſe for the Information* [e]. That the ſaid Court is bound of Right, in every ſuch Caſe, to award them, whether the Acquittal were upon the Merits, or only from a Slip in Point of Form, and howſoever notorious the Offence might be; for where a Court is au- thorized, by Statute, to do a Matter of Juſtice to the Party, upon cer- tain Circumſtances, it has no diſcretionary Power of conſidering, whether it ought to do it or not, when a Caſe appears to be within thoſe Circum- ſtances. To which may be added, That the Statute being general as to all Caſes wherein the Judge, who tries the Information, doth not certify a reaſonable Cauſe, ſeems to imply, That it ſhall be left to ſuch Judge only for this Purpoſe to conſider, whether the Proſecution were reaſonable or not, and it is the Proſecutor's Folly not to apply to him.

[e] Dom. Regina *verſus* Davis, *adjudged* Mich. 10 Annæ. Vide 2 Chancery *Caſes* 191.

Sect.

Sect. 14. It is further enacted by 9 *Anne*, 20. *That in caſe any Perſon or Perſons ſhall uſurp, intrude into, or unlawfully hold and execute the Office or Franchiſe of Mayor, Bailiff, Portreeve, or other Office within a City, Town corporate, Borough, or Place in* England *or* Wales, *it ſhall and may be lawful, to and for the proper Officer of the Court of Queen's Bench, the Court of Seſſions of Counties Palatine, or the Court of Grand Seſſions in* Wales, *with the Leave of the ſaid Courts reſpectively, to exhibit one or more Information or Informations, in the Nature of a* Quo Warranto, *at the Relation of any Perſon or Perſons, deſiring to ſue, or proſecute the ſame, and who ſhall be mentioned in ſuch Information or Informations, to be the Relator or Relators againſt ſuch Perſon or Perſons, ſo uſurping, intruding into, or unlawfully holding and executing any of the ſaid Offices or Franchiſes, and to proceed therein in ſuch Manner as is uſual in Caſes of Informations, in the Nature of a* Quo Warranto; *and if it ſhall appear to the ſaid reſpective Courts, that the ſeveral Rights of divers Perſons to the ſaid Offices or Franchiſes may properly be determined on one Information, it ſhall and may be lawful for the ſaid reſpective Courts to give Leave to exhibit one ſuch Information againſt ſeveral Perſons, in order to try their reſpective Rights to ſuch Offices or Franchiſes, and ſuch Perſon or Perſons, againſt which ſuch Information or Informations, in the Nature of a* Quo Warranto, *ſhall be ſued or proſecuted, ſhall appear and plead as of the ſame Term or Seſſions in which the ſaid Information or Informations ſhall be filed, unleſs the Court, where ſuch Information ſhall be filed, ſhall give further Time to ſuch Perſon or Perſons, againſt whom ſuch Information ſhall be exhibited, to plead; and ſuch Perſon or Perſons who ſhall ſue or proſecute ſuch Information or Informations, in the Nature of a* Quo Warranto, *ſhall proceed thereupon, with the moſt convenient Speed that may be.*

Sect. 15. And it is further enacted and declared, *That in caſe any Perſon or Perſons, againſt whom any Information or Informations, in the Nature of a* Quo Warranto, *ſhall, in any of the ſaid Caſes, be exhibited in any of the ſaid Courts, ſhall be found or adjudged guilty of an Uſurpation, or Intruſion into, or unlawfully holding and executing any of the ſaid Offices or Franchiſes, it ſhall and may be lawful, to and for the ſaid Courts reſpectively, as well to give Judgment of Ouſter againſt ſuch Perſon or Perſons, of and from any of the ſaid Offices or Franchiſes, as to fine ſuch Perſon or Perſons reſpectively, for his or their uſurping,* &c. *And alſo to give Judgment that the Relator or Relators, in ſuch Information named, ſhall recover his or their Coſts of ſuch Proſecution; and if Judgment ſhall be given for the Defendant or Defendants in ſuch Information, he or they, for whom ſuch Judgment ſhall be given, ſhall recover his or their Coſts therein expended againſt ſuch Relator or Relators, ſuch Coſts to be levied by* Capias ad Satisfaciendum, Fieri Facias, *or* Elegit.

Sect. 16. And it is further enacted, *That the Statute for the Amendment of the Law, and all the Statutes of* Jeofails *ſhall be extended to Informations, in Nature of a* Quo Warranto, *and Proceedings thereon, for any the Matters in the ſaid Act mentioned.*

And now I am in the ſecond Place to conſider the Nature of ſuch Information as is partly the Suit of the King, and partly the Suit of the Party, which is commonly called an Information *qui tam*, and this having a great Affinity with Actions on Statutes, I ſhall conſider them together, and endeavour to ſhew,

1. In what Caſes they lie.
2. What ought to be the Form of them.
3. In what Courts they may be brought.
4. In what County.
5. Within what Time.
6. Who

6. Who are disabled to bring them.
7. Whether there may be a Nonsuit in them?
8. Whether the Informer or Defendant may appear by Attorney?
9. In what Cases there shall be Costs.
10. Whether the Defendant may wage his Law, or take Advantage of a Protection?
11. In what Manner the Defendant is to plead to such an Information or Action.
12. By whom the Replication shall be made.
13. In what Manner the Issue shall be joined, and where it shall be tried.
14. Where the Verdict may be found as to Part of the Information against the Informer, and as to other Part for him.
15. What Judgment on such an Information or Action is good.
16. Whether the Penalty of a penal Statute may be compounded or granted over?

Sect. 17, As to the first of these Particulars, *viz.* In what Cases an Information or Action *qui tam* will lie; I [a] take it for granted, that they lie on no Statute which prohibits a Thing as being an immediate Offence against the Publick Good in general, under a certain Penalty, unless the Whole, or Part of such Penalty be expresly given to him who will sue for it; because [b] otherwise it goes to the King, and nothing can be demanded by the Party. But where such Statute gives any Part of such Penalty to him who will sue for it by Action or Information, *&c.* I take it to be settled at this Day, That any one may bring such Action, or Information, and lay his Demand [c] *tam pro Domino Rege quam pro seipso.* [d] Also where a Statute prohibits, or commands a Thing, the Doing or Omission whereof is an immediate Damage to the Party, and also highly concerns the Peace, Safety, or good Government of the Publick, or the Honour of the King, or of his Supreme Courts of Justice; as the Statutes of the [e] Scandal of Great Men, of [f] Hue and Cry, and those that restrain certain Suits in the [g] Civil or Canon Law Courts, or even in inferior [h] Common Law Courts, it seems to have been the general Opinion, that the Party grieved may, and it is holden [i] by some that he ought to bring his Action on such Statute *tam pro Domino Rege quam pro seipso.* And it seems to be taken [k] as a Ground in some Books, That where-ever the King is to have a Fine on an Action on a Statute, the Action must be so laid; but not where the Defendant is only to be amerced. But I much question, Whether this be a good general settled Rule in Relation to this Matter? since in an Action on the Statutes of Hue and Cry, the Defendant shall [l] only be amerced; and yet such Action may certainly be laid *tam pro Domino Rege quam pro seipso.* Also in Actions, which by the Common Law a Man may bring *tam pro Domino Rege quam pro seipso*, as in those for Injuries to the Party, mix'd with a high Contempt to the King, (as where a [m] Judge refuses to allow the Benefit of the King's Pardon to a Prisoner, unless he will give him such a Bribe; or where one makes a [n] Rescous of one taken on a *Capias Utlagatum*, at the Suit of the Party, or the Sheriff suffers one taken on such a *Capias* to [o] escape) the Plaintiff is [p] said to have his Election to lay his Action this Way, but not to be compelled so to do. To which may be added, that the Plaintiff cannot so lay his Action for a Common Trespass at Common Law, and yet therein the Defendant is to be fined.

[a] 2 And. 127, 128.
[b] 2 And. 128. 2 Jon. 234. Vide 1 And. 139, 140.
[c] Vide Co. Ent 375, 376, 377.
[d] 1 Lutw. 133, 134, 138, &c. Dy. 95. pl. 36. 346. pl. 9. 1 And. 139, 140. Long quinto Ed. 4. 117. b. 118. a. 4 Co. 13. a. 12 Co. 134.
[e] 4 Co. 13. a. 12 Co. 134. Hetl. 122.
[f] Ra. Ent. 406, 407. Co. Ent. 348, &c.
[g] Ra. Ent. 226. dismes 23. b. pl. 1. 24 a. pl. 2. Cro. Jac. 134. Dy. 159. b. 1 Ro. Re. 203.
[h] Ra. Ent. 433. pl. 1, 2.
[i] 4 Co. 13. a.
[k] Cro. Jac. 134. Hetl. 121. Vide Moore 911, pl. 1285.
[l] Cro. Jac. 350.

[m] 1 Rol. A. 1. A. pl. 1. n. 1 Rol. A. 1 A. pl. 2. [o] 1 Rol. Re. 78. pl. 19. Cro. Jac. 360, 361, 532, 533. Cr. Eliz. 877. *Parallel Cases*, Noy. 22. 2 Rol. A. 93. pl. 14. 41 Ass. pl. 12. 27 Ass. pl. 49. [p] Cro. Jac. 619 pl 5.

Neither does the Opinion I would contend againſt, ſeem to be confirmed by the conſtant Courſe of Precedents; but on the contrary, many of thoſe on the Statutes againſt [a] Forcible Entries, and on the Statutes againſt [b] Illegal Diſtreſſes, do not lay the Action *tam pro Domino Rege quam pro ſeipſo*; and yet there are [c] Authorities in this laſt Caſe, as well as in the former, that the Defendant is liable to be fined. But the Caſe of an [d] Action on 2 & 3 *Ed.* 6. 13. wherein it ſeems clear that it is not neceſſary to lay the Action *tam pro Domino Rege quam pro ſeipſo*, does not ſeem to come up to the Point; becauſe it is generally holden, that the Defendant is only amerceable in ſuch Action, being in Nature of an Action of Debt, and not finable, as it is ſaid [e] that he may be in an Indictment or Information grounded on the [f] Contempt of the Statute.

[a] Co Ent 44. b. 146. a. *Precedents both Ways.*
[b] Ra. Ent. 226. b. pl. 1.
2 Inſt. 132, 133.
[c] Co. Ent. 45. b.
35 H. 6. 6.
2 Inſt. 131.
2 Rol. A. 222 pl. 12, 13.
Quære Dy. 177. b.
1 Danv. 460. pl. 12.
Cro. Ca. 559, 560.
[d] More 911. pl. 1285.
2 Rol. Abr. 223. pl. 17.
Cro. El. 621.
Hetl. 121, 122.
[e] Moore 911. pl. 1285.
Vide Cro. Ja. 538, 631
[f] Vid. Sav. 62.

Sect. 18. As to the ſecond Particular, *viz.* What ought to be the Form of ſuch Information or Action: Having in the precedent Chapter *Sect.* 94. endeavoured to ſhew that there is no need that ſuch Information or Action conclude *contra pacem*; and in *Sect.* 97. Whether it be neceſſary for them to conclude *in contemptum Regis*; and in *Sect.* 102. That they need not recite the Statute whereon they are grounded; and in *Sections* 103, 104, *&c.* What Miſrecitals of a Statute will be fatal; and in *Sect.* 112, 113, *&c.* How far it is neceſſary to bring the Caſe within the very Words of the Statute; and in *Sect.* 118, 119. How far it is neceſſary to conclude *contra formam Statuti*; and in *Sect.* 117. In what Caſes one may have Judgment on a Statute, in an Action brought at Common Law; I ſhall in this Place obſerve only theſe following Particulars:

Sect. 19. *Firſt*, If an Information contain ſeveral Offences againſt a Statute, and be well laid as to ſome of them, but defective as to the reſt, the Informer may have Judgment for ſo much as is well laid. [g] As where the Words of the Statute are fully purſued in the Deſcription of ſome of the Offences and not of others; [h] or where ſome of the Times that the Defendant hath offended againſt the Statute are expreſſed with convenient Certainty, and others not; as where it is alledged that the Defendant, for eleven Months, and more, from 10 *September*, in ſuch a Year, unto 9 *September* in the Year following, uſed a Trade, without having been an Apprentice, *&c.* or was abſent from Church, *&c.* in which Caſes Judgment ſhall be given for the eleven Months. But if the whole Time be expreſſed inconſiſtently; as that the Defendant was an Offender eleven Months, from the firſt of *November* in ſuch a Year, to the firſt of *Auguſt* following, the whole is void for the Repugnancy, as hath been more fully ſhewn, *Ch.* 25. *Sect.* 64.

[g] Cro. Jac. 104.
[h] 1 Sid. 368. 2 Keb. 366, 367. 2 Rol. A. 696. pl. 7. Cro. Jac. 529, 530. Cro. El. 835.

Sect. 20. *Secondly*, It ſeems to be ſettled at this Day, That it is in the Election of him who brings an Action on a penal Statute, which gives one Moiety of the Forfeiture to the King, and another to the Informer, either to have a Writ againſt the Defendant, *Quod reddat* [i] *Domino Regi & A. B. qui tam, &c. quas eis debet*; or to have it in this Form, *Quod reddat A. B. qui tam, &c. quas ei debet.* Alſo it ſeems to be ſettled, That whether the Writ be in the one Form, or the other, it is well purſued by a Declaration in the Name of the Plaintiff only. [k] Alſo it ſeems to be doubtfull, whether there be any neceſſity that either the Writ, or Count, in any ſuch Action, do expreſs that it is brought by or for the King, as well as the Party, as hath been more fully ſhewn in the 17th *Section*; and there is a [l] Precedent of ſuch an Action brought in the King's Name by *A. B. qui pro ſeipſo in hac parte ſequitur.* But it ſeems [m] agreed, that

[i] 1 Jon. 261, 262. Cro. Ca. 256. Pl. com. 77, 78. Dy. 95 pl. 36. 3 Lev. 374, 375. *Quære* Dalis. 66, 67. More 64, 65. Bro. Act. ſur le Statute, 4. 27 H. 8. 23. pl. 20.

[k] Bro. Act. popular 5. Long quinto Ed. 4. 117. b. 118. a. *See* Raſt. Ent. 686. Vit. 1. 427. pl 4. 428. pl. 5.
[l] Raſt. Ent. 427. pl 3.
[m] Jo. 261, 262. Cro. Ca. 256. Co. Entr. 371. b.

every

every Information must be in this Form, That the Informer *tam pro Domino Rege quam pro seipso sequitur*, even where it is brought on a Statute which gives one third Part of the Penalty to a third Person. But I find some difference as to the Forms of such Informations, as to some other Respects; for sometimes they say, [a] That the Action accrues to the Informer *qui tam, &c.* to demand the Sum forfeited, for the King and himself; and [b] sometimes that the Action accrues to the King, and to the Informer, *qui tam, &c.* and [c] sometimes, that it accrues to the King, and to *J. S. &c.* (*viz*, where the Statute divides the Penalty into three Parts, *&c.*) and also to the Informer, *qui tam, &c.* and sometimes they have no [d] Clause at all of this Kind. And * *Quære*, If it be not fatal to have any such Clause where the Penalty is not recoverable by the Information, but requires a subsequent one, grounded on the Conviction? Also, sometimes such Informations pray Process against the Defendant, to bring him in to [e] Answer to the Informer, *qui tam, &c.* only; sometimes [f] to answer *tam Domino Regi quam A. B. qui tam, &c.* and [g] sometimes to Answer *de & super præmissis* generally, without expressing to whom.

[a] Co. Ent. 370. b. Ra. Ent. 430. pl. 13, 14. 431. b. pl. 15. 463. b. 5.
[b] Co. Entr. 369. a. 366. a. b. 365 a. Rast. 208. b.
[c] Co. Ent. 371. b. Vide 2 Keb. 820. 2 Mod. 100.
[d] Co. Ent. 370. a. 364. a. b.
* 1 Lutw. 162. Vide Sup. B. 1. Ch. 8. S. 10.
[e] Co. Ent. 364. b.
[f] Co. Entr. 370. a. 369, a. 366. a. b. 365. a.
[g] Co. Ent. 371, b. 372. a.

Sect. 21. *Thirdly*, Regularly it is safest for every such Information, or Action, to demand the very Sum due to the Informer, and neither more or less; for it hath been adjudged, [h] That if an Action on a Statute demand the whole Forfeiture for the Informer, where the Statute gives Part of it to the King, it is insufficient: Also it hath been holden, [i] That if the Information make no Demand at all, or demand more or less for the Party than appears to be his Due, it is insufficient as to him; yet [k] perhaps it may be good as to the Share of the Forfeiture given to the King. Also it hath been [l] adjudged, That it is sufficient to demand the Share due to the Informer, without making any mention of that due to the King: Also, [m] where the *quantum* of the Forfeiture depends upon the finding of the Jury, as it does on the Statute of *Forestalling*, it hath been adjudged sufficient to leave a Blank for the Sum. Also it hath been [n] adjudged, That a Popular Action may conclude *ad grave damnum*, without adding, *of the Plaintiff*; because every Offence, for which such Action is brought, is supposed to be a general Grievance to every Body.

[h] Bro. Action sur le Statute 4. 27 H. 8. 23. pl. 20. Vide Hob. 245.
[i] Hob. 245. Vide Cro. Ca. 330, 331.
[k] Cro. Ca. 330, 331.
[l] 1 Jon. 156, 157.
[m] 1 Jon. 156, 157.

Sect. 22. *Fourthly*, It is enacted by 18 *Eliz.* 5. *Par.* 1. *That none shall be admitted or received to pursue against any Person or Persons, upon any penal Statute, but by Way of Information or Original Action, and not otherwise.* And it hath been adjudged, That no Popular Action, since this Statute, can be brought on a former Statute, either by [o] Bill in the King's Bench, or by [p] Plaint in an Inferior Court, but only by Original Writ, or Information; whether the Statute on which such Action is grounded, [q] inflict a Penalty generally, without saying how it shall be recovered, or expressly give a Recovery by Bill or Plaint, *&c.* (as that of 4 *&* 5 *Ph. & M.* against [r] making Kerseys, without having served an Apprenticeship; and that of 5 *Eliz.* 4. against [s] following any other Trade without having served an Apprenticeship.) Yet the contrary hath been since expressly adjudged [t] as to such former Statutes as expressly give a Recovery by Bill or Plaint, because the Statute of 18 *Eliz.* doth not mention original Writs, but original Actions; and a Suit by Bill or Plaint is an [u] original Action in the Court in which it is commenced, and therefore may reasonably seem to be only within the Intent of the Statute, where it is removed into a superior Court, and there proceeded upon. And if this be

[n] Bro. Action Popular. 2.
[o] Cro. Eliz. 76, 77. Mo. 247. pl. 390. 3 Inst. 194.
[p] Cro Eliz. 544. pl. 14.
[q] 23 H. 6. 10. Cro. El. 76, 77. Mo. 247. pl. 390. 3 Inst. 194.
[r] 4 & 5 Ph. & M. 5. par. 32, 33, 34. 6 Co. 19. b. Mo. 412. pl. 565. [s] 5 El. 4. par. 31, 39. Cro. El. 544 pl. 14. Noy. 60. [t] 1 Rol. Ab. 537. pl. 8. 9. Abr. 279, 280. 3 Leon. 237.
[u] Vide 2 Danv.

the Meaning of the Statute, I see not how any Suit whatever, by Bill or Plaint on any penal Statute, can be within the Purview of it, while such Bill or Plaint continue in the Court in which they were commenced, whether the Statute on which they are brought do expressly mention them, or leave the Method of suing to the general Construction of Law. To which may be added, That the Statute of 21 *Jac.* 1. 4. *Par.* 1. seems to suppose, that Actions on penal Statutes may indifferently be brought by Writ, Plaint, Bill, or Information; for the Words are, *That all Offences hereafter to be committed against any penal Statute, for which any Common Informer or Promoter may lawfully ground any Popular Action, Bill, Plaint, Suit, or Information, before Justices of Assise,* &c. *shall be commenced,* &c. *by way of Action, Plaint, Bill, Information, or Indictment in the proper County, before the Justices of Assise,* &c. However it seems clear, [a] That no Suit, by Bill or Plaint, by a Party grieved, suing upon a Clause, either expressly or impliedly relating to himself only, is within the said Statute of 18 *El.* For it is expressly provided, *Par.* 6. *That it shall not restrain any certain Person, Body Politick or Corporate, to whom, or to whose Use, any Forfeiture is limited by any Statute, and not generally to any Person that will sue; but that every such Person may sue as before.* [b] But where the Party particularly grieved by an Offence against a Statute, sues for a Forfeiture generally limited to any one who will sue for it, he seems to be as much within the Restraint of the said Statute, as if he were not the Party grieved.

[a] Cro. El. 434. pl. 45. 645. pl. 53. Vide Cro. El. 76, 77. 3 Leon. 237.

[b] Cro. El. 76, 77. Vide 3 Leon. 237.

Sect. 23. *Fifthly,* [c] In an Action on a Statute, which requires some Officers at one certain Time after their Admission, and others at another, to qualify themselves by certain Acts, it is safest, expressly to shew the Time when the Defendant was admitted to his Office, and that he neglected to qualify himself in the Time limited; and also, That he actually exercised his Office after such Neglect.

[c] Lutw. 162.

Sect. 24. *Sixthly,* It is said, [d] That the Fact is sufficiently alledged after a *quod cum* in an Action on a Statute, but not in an Information.

[d] Show. 337.

Sect. 25. As to the Third Particular, *viz.* In what Courts such an Information or Action may be brought: Having already, *Ch.* 5. *Sect.* 32. endeavoured to prove, that where a Statute appoints that a Penalty shall be recovered in any of the King's Courts of Record, the Offence may be indicted before Justices of *Oyer* and *Terminer*, tho' not in a Court-Leet, or of [e] Pie-powders, or such others, instituted for special Purposes; and intending under the next Particular, incidentally to consider what Suits may be brought in the Courts of *Westminster-Hall*, on penal Statutes; I shall only take Notice in this Place, That where a Statute limits Suits by an Informer *qui tam* to other Courts, yet any [f] one may, by Construction of Law, exhibit an Information in the Exchequer for the whole Penalty for the Use of the King.

Contra Hutt. 99. 1 Jo. 193. Litt. 163. Vide Cro. Ca. 112. 1 Vent. 8.

[e] Cro. El. 530. pl. 59 6 Co. 20. a.

[f] 2 And. 127, 128. Cro. Jac. 178, 179.

Sect. 26. As to the Fourth Particular, *viz.* In what County such Information or Action may be brought. It is enacted by 31 *El.* 5. *That in any Declaration, or Information, (*[g] *not being exhibited by such Officers of Record, as had in Respect of their Offices, before the Time of the said Statute, lawfully used to exhibit Informations, or sue upon penal Laws; and not* [h] *concerning Champerty, buying of Titles, or Extortion, or the King's Customs,* &c. *or Usury, or Forestalling,* &c.*) the Offence against any penal Statute shall not be laid to be done in any other County but where the Matter alledged to be the Offence, was in truth done: And that the Defendant may traverse, and alledge, That the Offence supposed to be committed, was not committed in the County where*

[g] Parag. 3.

[h] Parag. 4. B. 1. Ch. 8c. S. 47.

where it is alledged; which being tried for the Defendant, or if the Plaintiff be thereupon nonsuit, the Plaintiff shall be barred in that Action or Information.

Sect. 27. It is further enacted, *Par.* 7. *That all Suits for using unlawful, or not using lawful Games, or for not having Bows or Arrows, or for using a Trade without having been brought up in it, shall be sued and prosecuted in the General Quarter-Sessions of the Peace, or Assises of the same County, where the Offence shall be committed, or otherwise enquired of, heard and determined in the Assises, or General Quarter-Sessions of the Peace of the same County where such Offence shall be committed, or in the Leet within which it shall happen, and not in any wise out of the same County, where such Offence shall happen, or be committed.*

In the Construction of this Statute, the following Particulars seem most remarkable.

Sect. 28. *First*, That it hath been adjudged, That the Defendant can have no Advantage of the above-recited Clause, which appoints, That all Offences against penal Statutes shall be laid in the proper Counties, but [a] only by way of Plea; and this Construction seems very agreeable to the Purport of the said Clause; the Words whereof are, *That the Defendant may traverse the County*, &c. *which being tried for him, or if the Plaintiff be thereupon nonsuit, the Plaintiff shall be barred*, &c. But *this Point is otherwise settled by* 21 *Jac.* 1. 4. *Par.* 3.

[a] 2 And. 180. the contrary adjudged. Cro. El. 735. 736.

Sect. 29. *Secondly*, That the said Clause extends [b] not to any Suit by a Party grieved, or by the [c] Attorney General, but only by those brought by Common Informers.

[b] Cro. El. 645. pl. 53. [c] 1 Vent. 8. Cro. Ja. 178.

Sect. 30. *Thirdly*, That the last recited Clause, concerning Suits for using a Trade without having been brought up in it, *&c.* which are appointed to be brought at the Assises, or Sessions, in the proper County, and not in any wise out of the County, restrains not an Information in the [d] King's Bench, or Exchequer, for such Offence happening in the same County where those Courts are sitting; for the negative Words of the Statute are not, That such Suits shall not be brought in any other Court, but, That they shall not be brought in any other County; and the Prerogative of these High Courts shall not be restrained without express Words. But where the Offence is in a different County, such Suits, in those, or any other Courts, out of the proper County, seem to be within the express [e] Words of the Statute: Yet it was long a very great Question, Whether an Action of Debt or Information, in the Courts of *Westminster-Hall*, were not to be construed to be out of the Meaning of them? But this Point is now settled in the Construction of the Statute of 21 *Jac.* 1. 4. as shall be more fully shewn hereafter.

[d] Cro. Jac. 178, 179. Salk. 373. Hob. 184.

[e] Vide Hob. 184, 327. Cro. Jac. 85.

Sect. 31. It is enacted by the said Statute of 21 *Jac.* 1. 4. *That all Offences to be committed against any penal Statute, for which any Common Informer or Promoter may lawfully ground any Popular Action, Bill, Plaint, Suit or Information, before Justices of Assise, Justices of* Nisi Prius, *or Gaol-Delivery, Justices of* Oyer *and* Terminer, *or Justices of Peace, in their General or Quarter-Sessions, (except Offences against the Statutes concerning* [g] *Recusancy*, &c. *or Maintenance*, &c. *or the King's Customs*, &c. *or transporting Gold, or Silver, or Munition, or Wool, or Leather*, &c.) *shall be commenced, sued, prosecuted, tried, recovered and determined, by Way of Action, Plaint, Bill, Information or Indictment, before the Justices of Assise, Justices of* Nisi Prius, *Justices of* Oyer *and* Terminer, *and Justices of Gaol-Delivery, or before the Justices of the Peace of every County, City, Borough or Town Corporate, and Liberty, having Power to enquire of, hear, and determine the same, in*

[f] 1 Keb. 584. pl. 46. 2 Keb. 99. pl. 23. 125. pl. 77. 3 Keb 247. pl. 67. 448. pl. 8. [f] Sid. 403, 400.

[g] Vide Hob 251. & B. 1. ch. 10. S. 5. Raym. 394.

England or Wales, *wherein such Offences shall be committed, in any of the Courts, Places of Judicature, or Liberties aforesaid, respectively, only at the Choice of the Parties who shall commence Suit, or prosecute for the same, and not elsewhere, save only in the said Counties, or Places usual for these Counties, or any of them: And that the like Process in every Popular Action, Bill, Plaint, Information or Suit, to be commenced, sued or prosecuted, by Force of, or according to the Purport of this Act, be had and awarded, to all Intents and Purposes, as in an Action of Trespass* Vi & Armis *at Common Law. And that all, and all manner of Informations, Actions, Bills, Plaints, and Suits whatsoever, to be commenced, sued, prosecuted, or awarded, either by the Attorney General, or by any Officer whatsoever, or by any Common Informer, or other Person whatsoever, in any of his Majesty's Courts at* Westminster, *for, or concerning any the Offences aforesaid, shall be void.*

Sect. 31. And it is further enacted, *That if on the General Issue the Offence be not proved in the same County in which it is laid, the Defendant shall be found not Guilty,* as shall be more fully shewn under the eleventh Particular.

Sect. 32. Also it is farther enacted, *That no Officer shall receive, file, or enter of Record, any Information, Bill, or Plaint, Count or Declaration, grounded on the said penal Statutes, or any of them, which by this Act are appointed to be heard and determined in their proper Counties, until the Informer or Relator hath first taken a Corporal Oath before some of the Judges of that Court, that the Offence or Offences laid in such Information,* &c. *was, or were not committed in any other County than where, by the said Information,* &c. *the same is, or are supposed to have been committed,* &c. *the same Oath to be there entred of Record.*

In the Construction of this Statute, I shall observe the following Particulars:

Sect. 33. *First,* That as the Law is now [a] settled, no Action of Debt, or Information, or other Suit whatever, can be brought in any Court of *Westminster-Hall,* on any penal Statute, made before the said Statute of 21 *Jac.* for any Offence not therein excepted, for which the Offender may be prosecuted in the Country, [b] unless such Offence shall be committed in the same County in which such Court shall sit; and surely this cannot but be thought most agreeable to the Meaning as well as the Letter of the said Statute; the whole Provision whereof would be to little purpose, if such Suits should be construed out of it. And as to the Objection, That if all Suits on penal Statutes should be wholly taken from the Superior Courts, all Offences against them would become dispunishable by the Offender's removing himself out of the County wherein he committed them; because the Courts in the Statute mentioned have no Jurisdiction out of the Counties wherein they sit; it hath been answered, That Process of Outlawry will lie against such Offenders, by Vertue of the above-recited Clause of the said Statute, which gives the like Process in all Suits prosecuted according to the Purport of it, as in Actions of Trespass at the Common Law.

Sect. 34. *Secondly,* That [d] where a subsequent Statute gives an Action of Debt, or any other Remedy, for the Recovery of a Penalty in any Court of Record generally, it so far impliedly repeals the Restraint of 21 *Jac.* and consequently leaves the Informer at his Liberty to sue in the Courts of *Westminster-Hall.*

[a] 1 Salk. 372, 373. 5 Mod. 425. 2 Lev. 204. 3 Inst. 192, 193. *See the contrary adjudged* 1 Vent. 8. 1 Lev. 249. 3 Lev. 71. 3 Keb. 804. pl. 7. 2 Keb. 401, 447, 458. 1 Sid. 303, 400. *See the same Case doubted,* 1 Vent. 364. 2 Lev. 194. Latch. 192. Sup. Sect. 30. 1 Sid. 359, 360. 1 Lut. 165. 2 Keb. 340. pl. 10. Raym. 394.

[b] 1 Jon. 193. Sup Sect. 30.

[c] 1 Salk. 373. pl. 14.

[d] 1 Salk. 372, 373.

Sect.

Sect. 35. *Thirdly*, That the Statute of 21 *Jac.* gave [a] no Jurisdiction to the Courts therein mentioned, over any Offences, in relation to which they had none before; and [b] therefore that Suits for such Offences must be brought in the Courts of *Westminster-Hall*, in the same Manner as before.

[a] 1 Vent. 8. Cro. Ca. 112. Hutt 98, 99.
[b] Cro. Ca. 112. Litt. Rep. 163.

Sect. 36. *Fourthly*, That [c] the said Statute hinders not the Removal of any Indictment into the King's Bench by *Certiorari*; after which it may be either tried there, or in the Country by *Nisi Prius*.

[c] Hutt. 98, 99. Vide 2 Keb. 106 pl. 42. 1 Jon. 193.

Sect. 37. *Fifthly*, That [d] it hath been adjudged, That an Officer by receiving an Information without such a previous Oath, That the Offence arose in the same County in which it is laid, doth not make the Proceedings upon it erroneous; for the Act is only directory to the Officer, but doth not intend that such Oath should be made Parcel of the Record; and therefore the Omission of it cannot be assigned for Error; and yet the Act is express, That such Oath shall be entred of Record. But *Quære*, If the Court may not properly be [e] moved to set aside such Process, as having issued contrary to the Directions of the Statute?

[d] Cro. Ca. 316. Vide 4 Inst. 272. 2 Inst. 193.
[e] Vide Salk. 376. pl. 19. Sup. Sect. 10.

Sect. 38. *Sixthly*, That no [f] Suit by a Party grieved is within the Restraint of the Statute.

[f] Cro. El. 645. Noy 71. Shower 354. 3 Leo. 237.

Sect. 39. As to the fifth Particular, *viz.* Within what Time such Information or Action may be brought; it is to be observed, That all Popular Actions were limited to a certain Time by 7 *H.* 8. 3. But this [g] Statute being repealed by 31 *El.* 5. I shall take no farther Notice of it.

[g] Vide Bro. Action Popular, 6.

Sect. 40. But it is enacted by the said Statute of 31 *El.* 5. *Par.* 5. *That all Actions, Suits, Bills, Indictments, or Informations which shall be brought for any Forfeiture upon any Statute penal, made, or to be made, whereby the Forfeiture is, or shall be limited to the Queen, her Heirs or Successors only, shall be brought within two Years after the Offence committed; and not after two Years. And that all Actions, Suits, Bills, or Informations, which shall be brought for any Forfeiture, upon any penal Statute, made, or to be made, except the Statutes of Tillage, the Benefit and Suit whereof is, or shall be by the said Statute, limited to the Queen, her Heirs or Successors, and to any other that shall prosecute in that Behalf, shall be brought by any Person that may lawfully sue for the same, within one Year next after the Offence committed; and in Default of such Pursuit, that then the same shall be brought for the Queen's Majesty, her Heirs or Successors, any Time within the two Years after that Year ended. And if any Action, Suit, Bill, Indictment, or Information, shall be brought after the Time so limited, the same shall be void. And it is provided, That where a shorter Time is limited by any penal Statute, the Prosecution must be within that Time.*

Sect. 41. Also it is enacted by 18 *El.* 5. *Par.* 1. *That upon every Information which shall be exhibited on any penal Statute, a Special Note shall be made of the very Day, Month, and Year of the exhibiting thereof into any Office, or to any Officer, which lawfully may receive the same, without any Antedate thereof to be made; and that the same Information be accounted and taken to be of Record, from that Day forward, and not before: And that no Process be sued out upon such Information, until the Information be exhibited in Form aforesaid, &c. and that every Clerk making out Process contrary to this Act, shall forfeit* 40 s. &c.

Sect. 42. It is farther enacted by 21 *Jac.* 1. 5. *That no Officer shall receive, file, or enter of Record, any Information, Bill, Plaint, Count, or Declaration, grounded on any penal Statute (being* [h] *within the Provision of the said Statute of* 21 *Jac.) until the Informer or Relator hath first taken a corporal Oath, before some of the Judges of the Court, that he believes in his Conscience, the Offence*

[h] For this Matter see the 37th Sect.

fence was committed within a Year before the Information or Suit, within the County where the said Information or Suit was commenced, &c.

In the Construction of these Statutes, I shall observe the following Particulars;

[a] Hob. 270. *Sect.* 43. *First*, That [a] if an Offence prohibited by any penal Statute, be also an Offence at Common Law, the Prosecution of it, as of an Offence at Common Law, is no way restrained by any of these Statutes.

[b] *Shower's Rep.* 353, 354. *Sect.* 44. *Secondly*, That if a Suit on a penal Statute be brought after the Time limited, the Defendant needs not plead the Statute, but [b] may take Advantage of it on the General Issue.

[c] Cro. Co. 331. Cro. Jac. 366. Vide Dalis. 60. pl. 13. *Sect.* 45. Thirdly, That if an Information *tam quam* be brought after the Year, on a penal Statute, which gives one Moiety to the Informer, and the other to the King, it is naught only [c] as to the Informer, but good for the King.

[d] Supra Sect. 38. *Sect.* 47. *Fourthly*, That the Party grieved is [d] not within the Restraint of these Statutes, but may sue in the same Manner as before.

[e] Show. Rep. 353, 354. *Sect.* 48. *Fifthly*, That it seems not [e] to be settled, Whether the suing of a *Latitat* within the Year be a sufficient Commencement of a Suit on a penal Statute, to avoid the Limitation of these Statutes?

[f] Show. 353, 354. *Sect.* 49. *Sixthly*, That it [f] seems also to be questionable, Whether a Suit by a Common Informer, on a penal Statute, which first gives an Action to the Party grieved, and in his Default, after a certain Time, to any one who will sue, be within the Restraint of these Statutes?

Sect. 50. *Seventhly*, That it seems questionable, Whether the Clause in 31 *El. Par.* 4. by which it is enacted, *That nothing in the said Act contained shall extend to Champerty, King's Customs, or Forestalling*, &c. *but that every such Offence may be laid in any County; any Thing in the said Act to the contrary notwithstanding*, do except the said Offences, out of the above-recited Clause, relating to the Time within which Suits on penal Statutes must be brought? For the Words above-mentioned, *viz. But that every such Offence may be laid in any County*, seem to restrain the Generality of the precedent, which say *That nothing in the Act contained shall extend to such Offences.*

Sect. 51. As to the sixth Particular, *viz.* What Persons are disabled to bring such an Information or Action: It is enacted by 31 *El.* 5. *Par.* 1. *That no Person, other than the Party grieved, shall be received to inform, or sue upon any penal Statute, that before that Time hath been for any Misdemeanor, by any Order of any the Queen's Majesty's Courts, ordered not to follow or pursue any Suit upon any penal Statute.*

[g] Co. Litt. 139. b. Fitz. Nonsuit, 13. Bro. Nonsuit 68. Prerog. 116. [h] Co Litt. 139. b. Bro. Nonsuit 68. Prerog. 116. [i] Bro. Nonf. 35. Quere Salk. 21. pl. 11. [k] 37 H. 6. 5. a. Bro Nonsuit 35. [l] Litt. 139. b. [m] Co. Lit. 139. b. Vide 1 Sid. 430. *Sect.* 52. As to the seventh Particular, *viz.* Whether there may be a Nonsuit in such an Information or Action? It seems agreed, That notwithstanding the King [g] cannot be nonsuit in any Information or Action, wherein he himself is the sole Plaintiff; yet any [h] Informer *qui tam*, or [i] Plaintiff in a Popular Action, may be nonsuit, and thereby wholly [k] determine the Suit, as well in Respect of the King as of himself: Also it seems agreed, [l] That the Attorney General may enter a *Nolle Prosequi*, (which, as [m] some say, has the Effect of a Nonsuit) to any Information or Action brought by the King only.

Sect. 53. As to the eighth Particular, *viz.* Whether the Informer or Defendant may appear by Attorney? It seems agreed, That after [a] Plea pleaded to an Indictment, Information or Action, for any Crime whatsoever, under the Degree of [b] capital, the Defendant might always, by the Favour of the Court, be permitted to appear by Attorney: Also it seems That generally the Court might always dispense with the personal Appearance of the Defendant, even before [c] Plea pleaded, [d] except in such Cases, wherein a personal Appearance is required by some Statute, as it is in [e] *Præmunire, &c.* in which Cases it seems generally agreed, That an Appearance by Attorney cannot be admitted, without some special Writ or Grant to that Purpose, whether the Defendant be a Peer [f] or Commoner. It is said indeed, in *Rolle's Rep.* That Sir [g] *Anthony Mildmay* was suffered to plead a Pardon to a *Præmunire* by Attorney, and no Mention is made of any such Writ or Grant: But I presume that there was a Clause to this Effect in his Pardon.

[a] Bro. Attor. 53, 54, 63, 101. 9 Ed. 4. 2. pl. 8. 9 Ed 4 4. pl. 44. 22 Ass. pl. 73. [b] Bro. Attor. 63. [c] Dy. 346. 9. 1 Lev. 146. Vide 21 Ed. 4. 77. pl. 12. 7 H. 6. 21. a. [d] Fitz Attor. 48, 53, 104. 3 Inst. 125. 39 Ed. 3. 7. 15 H. 7. 9. pl. 12. F. N. B. 66. Lett. H. & M. Vide Bro. Attorn. 69, 81, 82. 37 H. 6. 27. b. 3 H. 7. 6. pl. 4. Cro. Jac. 462, 616. 22 Ed. 4. 33, 34. [e] See Cases cited to Lett. d. [f] 15 H. 7 9. pl. 12. 39 Ed. 3. 7. [g] 1 Rol. Rep. 190. Vide 2 Bulst. 299.

Sect. 54. It is enacted by 18 *El.* 5. Par. 1. *That every Informer, upon any penal Statute, shall exhibit his Suit in proper Person, and pursue the same only by himself, or by his Attorney in Court; and that he shall not use any Deputy or Deputies at all.*

Sect. 55. It is recited by 29 *El.* 5. Par. 21. *That divers of her Majesty's Subjects, dwelling in the remote Parts of the Realm, had been many Times maliciously troubled upon Informations and Suits, exhibited in the Courts of the King's Bench, Common Pleas, and Exchequer, upon penal Statutes, and had been drawn up upon Process out of the Countries where they dwell, and driven to attend and put in Bail, to their great Trouble, and Undoing; and for Reformation thereof, it is enacted, That if any Person or Persons, shall be sued or informed against, upon any penal Law, in any the said Courts, where such Person or Person are bailable by Law, or where, by the Leave or Favour of the Court, such Person or Persons may appear by Attorney; in every such Case, the Person or Persons so to be impleaded or sued, shall, and may, at the Day and Time contained in the first Process served for his Appearance, appear by Attorney of the same Court where the Process is returnable, to answer and defend the same, and not be urged to personal Appearance, or to put in Bail for the answering such Suits.*

Sect. 56. And it is enacted by 31 *El.* 10. Par. 20. *That this shall extend only to the natural Subjects born, or to be born, within the Dominions of the Queen's Majesty, her Heirs or Successors, and to Persons made free Denizens, and to no others.*

As to the ninth Particular, *viz.* In what Cases there shall be Costs on such an Action or Information, I shall endeavour to shew,

1. Whether an Informer shall in any Case have his Costs.
2. In what Cases the Defendant shall have them.

Sect. 57. As to the first of these Particulars, I take it to be in a great Measure settled, [h] That an Informer upon a Popular Statute, shall in no Case whatsoever have his Costs, unless they be expressly given him by such Statute; for it is certain that he cannot recover them by the Common Law, for that doth not [i] give Costs in any Case: Neither can he recover them by the Statute of *Gloucester*, 1. which gives the Demandant his Costs in all Cases wherein he shall recover his Damages; for this seems to suppose some Damage to have been done to the Demandant in particular, which cannot be said in any Popular Action; and therefore such Actions have always been construed to be out of the Be-

[h] 2 Keb. 781. pl. 12. 1 Rol. A. 574. pl. 4. [i] 1 Lutw. 200, 201. 1 Vent. 133. Salk. 206. pl. 4. Contra Moor 65. pl. 175. 3 Lev. 374. 2 Inst. 288.

nefit of this Statute. But it seems agreed, [a] That an Action on a Statute, by the Party grieved, for a certain Penalty given by such Statute, is within the Statute of *Glouceſter*, becauſe ſuch Penalty is intended him by way of Recompence for his particular Damage by the Offence prohibited; and if he could recover that only, and no more, by way of Coſts, it would be in moſt Caſes in vain for him to ſue for it, ſince the Coſts of Suit would exceed it. But it is ſaid, That no Coſts ſhall be recovered in an Action on a Statute, which gives no certain Penalty to the Party grieved, but only his Damages in general, *&c.* if ſuch a Statute be introductive of a new Law, and give a Remedy in a [b] Point not remediable at the Common Law. But there is not that Inconvenience in this Caſe as in the former; becauſe no certain Sum being ſpecified, the Jury may give the Plaintiff a full Satisfaction by way of Damages.

[a] 2 Keb. 781. pl. 12. 1 Rol. Abr. 574. P. 1, 2, 3, 4. 1 Jon. 447. Cro. Ca. 559, 560. 1 Lutw. 200, 201. 2 Inſt. 289.

[b] 1 Rol. Ab. 574 pl. 1. 1 Lutw. 200, 201. 10 Co. 116. Cro. Ca. 560. Salk. 206. pl. 4.

Sect. 58. As to the ſecond Particular, *viz.* In what Caſes the Defendant ſhall have Coſts: It is enacted by 18 *El.* 5. which is made perpetual by 27 *El.* 10. *That if any Informer or Plaintiff, on a penal Statute, ſhall willingly delay his Suit, or ſhall diſcontinue, or be nonſuit in the ſame, or ſhall have the Trial or Matter paſs'd againſt him therein, by Verdict or Judgment of Law, that then, in every ſuch Caſe, the ſame Informer or Plaintiff ſhall yield, ſatisfy, and pay unto the Party Defendant, his Coſts, Charges, and Damages, to be aſſigned by the Court in which the ſame Suit ſhall be attempted,* &c.

In the Conſtruction hereof, I ſhall take Notice of the following Particulars;

Sect. 59. *Firſt*, That it ſeems to be agreed, That no Action on any Statute, by the Party [c] grieved, is within the Purview of this Statute, the whole Purport whereof ſeems clearly to relate only to Common Informers: Yet, if ſuch Action, by the Party grieved, be *for any Offence or Wrong* [d] *perſonal, immediately ſuppoſed to be done to the plaintiff or Plaintiffs*; or whatſoever the Nature of the Action may be, *if the Plaintiff* [e] *might have Coſts, in Caſe Judgment ſhould be given for him*, he ſhall pay them on a Nonſuit or Verdict againſt him, *&c.* by Vertue of [f] 23 *H.* 8. 15. and 4 [g] *Jac.* 1. 3.

[c] 1 Salk. 30. 1 And. 116. Cro. El. 177. pl. 4. Noy 71. 2 Leon. 116.
[d] Vide Cro. El. 177. pl. 4
[e] Hutt. 22.
[f] Vide 2 Danv. Abr. 224 pl. 1, 2, 3.
[g] Vide 2 Danv. 225. pl. 9

Sect. 60. *Secondly*, That it hath been holden, That where Judgment is given againſt an Informer, becauſe the Court in which he [h] ſues has no Juriſdiction of the Cauſe, or [i] becauſe the Statute on which he grounds his Information is diſcontinued, yet he ſhall pay Coſts within the Intent of the ſaid Statute of 18 *Eliz.* which ſhall have a liberal Conſtruction, and was intended to prevent all vexatious Informations; and ſurely ſuch ill grounded Proſecutions cannot but be thought ſuch.

[h] 2 Keb. 581. pl. 12. 1 Sid 311.
[i] 2 Keb. 106. 42. *Quere* Hutt. 35, 36.

Sect. 61. As to the tenth Particular, *viz.* Whether the Defendant, in ſuch an Action or Information, may wage his Law, or take Advantage of a Protection? It is ſaid [k] to have been ruled, That the Defendant ought not to be admitted to wage his Law in any ſuch Action or Information, becauſe they are founded on a Statute; nor do I find any Authority to the contrary. But perhaps it may be queſtioned, How far the Reaſon given for the Opinion above-mentioned may be concluſive, ſince ſuch an Action or Information doth not ſeem ſo [l] properly to be grounded on a Statute, as on the Contempt of it. But as to the Queſtion, Whether the Defendant can take Advantage of a Protection? There ſeems to be near the ſame Number of Authorities on each [m] Side. But there is no great

[k] 10 H. 7 18. pl 18. Bro. Ley gage. 63, 106. Co. Lit. 295.
[l] Vide 21 H. 7. 15.
[m] *In the Affirmative*, Fitz. Protect. 98, 122. Keil. 135. b. *In the Negative*, Fitz Protection 61, 105: 21 Ed. 3. 13. pl 12. Co. Litt. 131. Vide 2 Rolle's Abr. 323. Letter G.

need nicely to examine these Matters, since generally it is expressly provided by penal Statutes, That neither Wager of Law, nor Protection, shall be admitted in any Suit brought upon them.

Sect. 62. As to the eleventh Particular, *viz.* In what Manner the Defendant is to plead to such an Information, or Action, I shall take it for granted, That he must answer to the whole [a] Time laid in such Information or Action; and that if he have any [b] special Matter for his Excuse or Justification, he must set it forth with all convenient Certainty; and that if he plead the General Issue to the whole, he must depend upon it, and not [c] together with it plead also a special Plea either to the Whole or Part of the Charge; but for these Matters I shall refer the Reader to the Books which treat of Pleading in general; and in this Place shall only consider,

[a] Bridg. 115.
[b] Vide Bridg. 114, 115.
[c] 1 Ro. Re. 49, 50, 134.

1. Where a prior Suit depending may be pleaded to such an Information or Action.
2. Where a Pardon, or Release, or a Recovery in a former Suit.
3. What is a good General Issue; and where it may be pleaded.

Sect. 63. As to the first Point, *viz.* Where a prior Suit depending may be pleaded to such an Information or Action: It seems agreed, [d] That where ever any Suit on a penal Statute may be said to be actually depending, it may be pleaded in Abatement of a subsequent Prosecution, being expressly averred to be for the same Offence. [e] Neither will it be any Exception to such a Plea, That the Offence in the subsequent Prosecution is laid on a Day different from that in the former. [f] Neither doth a Mistake in such a Plea of the very Day whereon the Suit pleaded as prior was commenced, seem to be material on the Issue of *Nul tiel Record*, if it appear in truth to have been commenced before the other, and for the same Matter. And if two Informations be exhibited on the very same Day, it seems [g] that they may mutually abate one another, because there is no Priority to attach the Right of the Suit in one Informer more than in the other. Also it seems, That an [h] Information or Bill [i] the same Day that they are filed, may be so far said to be depending, before any Process sued upon them, that they may be pleaded in Abatement of any other Suit on the same Statute. And from the same Reason it seems also, That a Writ of Debt may be so pleaded after it is returned; because then it seems to be agreed, That it may properly be said to be depending; and whether it may not also be so pleaded before it be returned, seems questionable; Because, according to some [k] Opinions, a Writ may be said to be depending as soon as purchased.

[d] Cro. El. 261. 1 Ro. Re. 49, 50, 134.
[e] Cro. El. 261. Vide 1 Ro. Re. 49, 50.
[f] Hob. 209.
[g] Hob. 138.
[h] Cro. El. 261.
[i] 10 Ed. 4. 13. pl. 2.
[k] Cro. El. 677. pl. 7. Cro. Jac. 11.

Doug. 228. post 367.

Sect. 64. As to the second Point, *viz.* Where a Pardon, or Release, or a Recovery in a former Suit, may be pleaded to such an Information, or Action? It seems agreed, That notwithstanding the King have such an Interest in every penal Statute, that he may [l] proceed in a Suit brought upon it by a Common Informer, after the Death, Release, or Nonsuit of such Informer, hanging the Prosecution; and may also totally prevent any such Suit, by first [m] suing for the whole Penalty himself; or may totally bar it by a Pardon or Release [n] precedent to its Commencement; yet if it be actually commenced before any Suit by the King, the Informer hath such an Interest in the Part of the Penalty assigned him

5 Co. 48. a. b. 1 Rol. Re. 379. pl. 37. cont. Salk. 89. pl. 11. 2 Ed. 4. 11. pl. 3. 7 Co. 30. a. [l] 11 Co. 65. b. 66. a. 5 Co. 48. b. Noy 100. 3 Inst. 194. 2 Bulst. 261, 262.

Cro. El. 583. Moore 541. Cont. Cro. El. 138. pl. 13. 37 H. 6, 5. a. 20 H. 7. 5. b. 6 a. Bro. Attaint, 130. Vide 2 Ro Re. 33. Hutr. 82. [m] Crompton Jurisdiction, 38. a. 3 Inst. 194. 11 Co. 65 b. 66. a. [n] Fitz. decies tantum, 5. Charter 21. Bro. Action Popular, 3, 4. 1 H. 7. 3. pl. 2. 37 H. 6. 4. 3 Inst. 194. 5 Ed. 4. 2, 3.

by

by the Statute, that the King can no [a] way discharge, or suspend the Suit, as to [b] such Part. Also it seems that the King can in [c] no Case bar the Suit of a Party grieved, nor proceed in it after the Death of the Plaintiff, *&c.* Also, it seems agreed, [d] That a Conviction or Acquittal *bona fide* in any Action or Information on a penal Statute, whether by the Party grieved, or a Common Informer, or a Release *bona fide*, from the Party grieved, or Common Informer, [e] after such a Conviction, hath always been a good Bar of any subsequent Prosecution for the same Offence. But for the better settling of these Matters, the Statute of 4 *H.* 7. 20. was made, by which it is recited, *That it had been usual for Offenders against penal Statutes, to cause Popular Actions to be commenced against them by Covin of the Plaintiffs, or else when such Actions had been commenced against them, to delay the same, either by Non-appearance, or by Traverse; and hanging the same, to cause the like Action Popular to be brought against them by Covin for the same Cause and Offence, and therein by Covin of the Plaintiff to be condemned, either by Confession, feigned Trial, or Release, which Condemnation or Release, so had by Collusion and Covin, did use to bar the Plaintiff in the Action sued in good Faith*; and thereupon it is enacted, *That if any Person sue with good Faith any Action Popular, and the Defendant plead any Manner of Recovery of Action Popular in Bar of the said Action; or else, that he before that Time barr'd the Plaintiff in any such Action Popular, that then such Plaintiff, with good Faith, may averr, That such Recovery or Bar were by Covin; and if such Collusion or Covin so averr'd, be lawfully found, such Plaintiff shall recover,* &c *and the Defendant condemned of Covin or Collusion, as aforesaid, shall have two Years Imprisonment,* &c. *and that no Release of any Common Person to any such Party, whether before or after any Action Popular or Indictment of the same, had, or commenced or made, hanging the said Action, shall be anywise available or effectual to let or surcease the said Action, Indictment, Process, or Execution. Provided always, That no Plaintiff or Plaintiffs be receiv'd to averr any Covin in any Action Popular, where the Point of the same Action, or else the Covin or Collusion, have been once tried, or lawfully found with the Plaintiff or Plaintiffs, or against them, by trial of twelve Men, and not otherwise.*

[a] Cro. El. 138 pl. 13. 1 Leon. 119. 1 H. 7. 3. pl. 2. 37 H. 6. 4. Hutt. 82. Bro. Action Popular 3, 4. 3 Inst. 194. [b] Sav. 23. [c] Noy 100. Moore 58. [d] Fitz. decies tantum 4, 5. Bro. Act. popular, 4 7. 7 Cro. Jac. 482. 1 H. 7. 3. pl. 2. 11 Co. 65. b. 66. a. 9 Ed. 4. 4. pl. 15 [e] 2 Ro Re. 33. Bro. Act. Popular, 7. 5 Ed. 4, 2, 3.

[f] Pl. com. 49, b. 50.

Sect. 65. It is [f] said, That if a Recovery in a former Suit be pleaded in Bar of any Popular Action, the Plaintiff may, by Reason of the express Words of the Statute, averr, That such Recovery was by Covin, without shewing wherein the Covin consisted; but otherwise such a general Pleading would be vicious.

As to the third Point, *viz.* What is a good General Issue, and where it may be pleaded? I shall observe the following Particulars;

Sect. 66. *First*, That if the Defendant plead *Nil debet* to an Action or Information *qui tam*, it is safest to say, That he owes [g] nothing to the Informer, nor to the King; because if he only plead, that he owes nothing to the Informer, it may be objected, [h] That the whole Declaration is not answered, which makes a Demand for the King as well as the Informer: Yet perhaps it may be a good Answer [i] to such Objection, That in the Plea, that he owes nothing to the Informer; it is necessarily implied that he owes nothing to the King, and therefore needs not be expressed.

[g] Vide Co. Ent. 165, b. 167. b. [h] Hob. 327, 328. 1 Vent. 122. [i] 3 Lev. 375. Vide Cro. Ca. 10, 11.

Sect. 67. *Secondly*, That if there be more than one Defendant, they ought [k] not to plead jointly that they are not guilty, but severally, That neither they, nor any of them, are guilty, *&c.*

[k] 21 H. 6. 20. pl. 37. Fitz. decies tantum 6. 2 Rol. Abr. 707. pl. 48.

Sect.

Sect. 68. *Thirdly*, That where-ever the Breach of the Statute, whereon such Suit is grounded, is alledged only from a Matter *in Pais*, and not from Matter of Record, the Defendant [a] may plead, that he owes nothing, or that he is not guilty, *&c.* but if it be alledged from a Matter of Record, such a Plea is not good; because a Record is not triable by the Country, but only by itself.

[a] 21 H. 7. 14. pl. 20. Bro. Issues joins, 23. Vide 21 Jac. 14 par. 4.

Sect. 69. *Fourthly*, That if the Defendant be within the Benefit of any *Proviso* of a penal Statute, he might, according to some, always give it in [b] Evidence on the General Issue, in a Suit on such Statute: But if he have Matter in his Discharge depending on a subsequent Statute, it hath been holden [c] (even since the Statute of 21 *Jac.* 1. 4.) That he must plead it specially, and cannot give it in Evidence. But this seems contrary to the express Purview of the said Statute; by which it is enacted, *That if any Suit shall be brought against any Person for any Offence against any penal Law, either by, or on the Behalf of the King, or by any other, or on the Behalf of the King, and any other, it shall be lawful for such Defendant, to plead the General Issue, that he is not guilty, or that he owes nothing, and to give such special Matter in Evidence to the Jury that shall try the same, which Matter being pleaded, had been sufficient in Law to have discharged the said Defendant against the said Suit, and the said Matter shall be then as available, to all Intents and Purposes, as if had been sufficiently pleaded in Bar.*

[b] 2 Rol. Abr. 683. p'. 10, 12. Cont. pl. 11.
[c] 2 Rol. Abr. 683. pl. 13.

Sect. 70. Also it is enacted by the same Statute, *Par.* 2. *That if the Defendant to any Suit, commenced by, or on the Behalf of the King, or any other, for any Offence against any penal Statute, plead, That he oweth nothing, or, that he is not guilty, and the Plaintiff or Informer, upon Evidence to the Jury, shall not prove the Offence laid in the said Suit, and that the same Offence was committed in the same County in which it is laid, the Defendant shall be found Not guilty.*

Sect. 71. It is provided by the last Paragraph of the said Statute, *That no Clause thereof shall extend to any Suit on any Law against Popish Recusants*, &c. *or against Champerty*, &c. *or concerning defrauding the King of his Customs*, &c. *or the transporting of Gold, or Silver, or Munition*, &c. *or Wool, or Leather, but that such Offence may be laid in any County, at the Pleasure of the Informer.* But *Quære*, If the last Words of this *Proviso*, *viz. but that such Offence may be laid in any County*, do not restrain the Exception intended by it to that Part of the Statute only which relates to the laying the Offence in the proper County? For if so, the Defendant in a Suit on the Laws mentioned in it, may give the special Matter in Evidence on the General Issue, as well as in a Suit on any other penal Statute.

Vide supra, Sect. 50.

Sect. 72. As to the twelfth Particular, *viz.* By whom the Replication is to be made in such an Information or Action: It seems agreed, [e] That regularly a Replication to a Special Plea to an Information in the Courts of *Westminster-Hall*, shall be made by the Attorney General only, who, in Respect of the King's Interest in the Suit, is presumed to be most proper to be consulted concerning it; and by the same Reason it [f] seems that such Replication in a Suit before Justices of Assize, shall be made by the Clerk of the Assizes only. Also it is said, [g] That the Replication to a General Issue in an Information *qui tam* in the Courts of King's Bench or Exchequer, may be made in the Name of the Attorney General only, by the Usage of those Courts. But in most of the [h] Precedents I can find of Actions *qui tam*, the Replication is made by the Plaintiff only. Also I find a Demurrer by the Informer only to a Plea in Bar to an [i] Information *qui tam*, without any mention of the Attorney General. And if the Attorney General, *&c.* shall absolutely refuse to make a Replication to

[e] 6 Co. 20. a. Vide Cro. Jac. 538. Cro. El. 138. pl. 13. 2 R. Re. 33. Bro. Attaint, 127. Co. Ent. 365, a. 366, a. 367, a. 368, a. 395. a. Ra. Ent. 410. a.
[f] Vide Cro. Jac. 502.
[g] 1 And. 49.
[h] Co. Ent 159, b. 163, a. b. 165, b. 166, a. 167. b.
[i] Co. Entr. 371. a.

[a] Vide supra, Sect. 64. 5 Co. 48. b.

any Plea to an Information, surely the Informer may be [a] admitted to make it himself; for otherwise it would be in the Power of the Attorney General, *&c.* by refusing to make a Replication, wholly to defeat the Suit.

[b] Cro. Ca. 336, 337. Vide Coke's Ent. 160, b. 161, b. 164, a. 348, b. 350. b.

Sect. 73. As to the thirteenth Particular, *viz.* In what Manner the Issue is to be joined in such an Information or Action, and where it shall be tried: It hath been laid down [b] as a settled Rule, That where the King is to have no Part of the Thing demanded in an Action on a penal Statute, but only a Fine or Amercement, there is no necessity either in the joining of the Issue or *Venire facias*, to use the Words *qui tam pro Domino Rege, &c.* but that it is sufficient simply to Name the Party, as in Actions at Common Law; for the King seems to have little more Interest in such Suits than in Actions at Law. Yet where ever the Plaintiff may declare *tam pro Domino Rege quam pro seipso*, it seems, [c] That it can be no Fault to use those Words as well in the joining of the Issue, *&c.* as in the beginning of the Suit. And if the King be to have Part of the Penalty demanded, it hath been [d] adjudged to be a fatal Fault, and not amendable after Verdict, not to mention that the Plaintiff sues *tam pro Domino Rege quam pro seipso*, in the joining of the Issue. But *Quære*; for there are many [e] Precedents where the Issues in such Actions have not mentioned the Plaintiff, as suing for the King; but have simply named him by his Proper Name, as in other Actions. And where he is expressly named in the Declaration, as suing for the King as well as for himself, Why it should be intended that he sues otherwise in the Progress of the Action?

[c] Ra. Ent. 406, b. 407. a. Co. Ent. 349. b.

[d] 1 Vent. 122. 2 Keb. 788. Vide supra, Sect. 17, 20.

[e] Co. Entr. 159, b. 163, a. b. 165, b. 166. a. 167. b. Vide supra, Sect. 17, 20.

Sect. 74. As to the Place where such Issues shall be tried, it is enacted by 18 *El.* 5. *That no Jury shall be compelled to appear in any of the Queen's Courts at* Westminster, *for the Trial of any Issue in any Suit* (by a Common [f] Informer) *upon any penal Law, for any Offence committed above thirty Miles from the City of* Westminster; *except in Case where the Attorney General for the Time being, for some reasonable Cause in that Behalf to be shewed, shall require the same to be tried at the Bar, in any of the Courts of the Queen's Majesty, her Heirs or Successors, at* Westminster *aforesaid: Which Request shall be noted on the Backside of the Writ of* Distringas *therenpon awarded, to the End the Sheriff, or his Bailiff, may, and shall signify the same to the Jury that are in such Case impanelled.*

[f] *See the three last Sections of the Statute. and the 22d, 47th and 49th Sections of this Chapter.*

Sect. 75. As to the fourteenth Particular, *viz.* Where a Verdict may be found as to Part against the Informer, and as to Part for him: It seems, [g] That regularly, if an Offence against a Statute be of such a Nature that it may be committed by a single Person, without the Concurrence of any other, and several Persons be jointly charged in one Information, for one Act done by them all against such Statute, one of them only may be found guilty, and the rest acquitted; because, tho' the Words of the Information seem to import a joint Charge against all the Defendants, yet in Judgment of Law each of them is charged severally for his own Offence, which cannot but be several, whether the Act, in the doing whereof it consisted, were done by one or more; and accordingly the Issue must be, that [h] neither they, nor any of them, are guilty. And for the like Reasons, if one be informed against for having offended against a Statute for more Times, or in a higher Degree than can be proved; as for not coming to Church during the Space of ten Months, where he can be proved to have been absent but eight Months, *&c.* or for [i] ingrossing 1000 Quarters of Wheat, where the Evidence amounts but to 700, he may be found guilty so far as the Evidence goes, and Not guilty for

[g] 2 Rol. Abr. 707, pl. 45, 48. 708 pl. 50. Lane 19, 59, 60.

[h] Supra Sect. 67.

[i] 2 Rol. Abr. 707. pl. 48. Lane 59, 60.

ne Residue; for such Offences are not in the Nature of entire Contracts, which regularly must be fully proved in the same Manner as they are alledged, but are in the Nature of Trespasses, which it is sufficient to prove for any Part. But if the Offence against a Statute consist in making a Contract contrary to the Purview of it; as in the Case of Usury, it is [a] said, That if it be alledged as having been made by two, it must be so proved likewise, because it is a Rule of Law, That if Contracts be not proved as they are laid, they shall not be taken to be the same.

[a] Line 19, 59, 60.

Sect. 76. As to the fifteenth Particular, *viz.* What Judgment on such an Information or Action is good? It hath been adjudged, That where a Statute (as that of Recusancy, for instance) ordains that the Offender shall forfeit such a Sum, and that the Sum to forfeited shall be divided into three Parts; whereof one Third shall go to the King, and one to the Informer, and the other to the Poor, *&c.* and that if the Offender do not pay, *&c.* within such a Time, that he shall be committed, *&c.* the Judgment on an Information *qui tam* on such Statute may be general, that the [b] King and Informer shall recover the whole [c] Sum, without making any mention how it shall be distributed, or that the Party shall be committed [d] for Non-Payment, *&c.* But on such an Information if the Judgment for the Recovery of the Forfeiture be given wholly for the Informer, without any mention of the King, it hath been holden, [e] That it is totally erroneous. Yet it hath been adjudged, That if on an Information *qui tam*, wherein, as it is laid, the Informer hath no Right to any Part, but the King ought to have the Whole, Judgment be given that the Defendant shall forfeit the Sum mentioned by the Statute, and that the King shall have one Moiety, and the Informer the other, such Judgment is erroneous [f] only as to the latter Part, wherein it awards to whom the Penalty shall go; but shall stand for the Clause concerning the Forfeiture, which sufficiently entitles the King to the Whole. And it hath been adjudged, [g] That if there be no Clause at all concerning the Forfeiture in a Conviction on a penal Statute, but only a Judgment *Quod Convictus est*, it is sufficient, for the Forfeiture is implied.

[b] 1 And. 139, 140. Vide Style Rep. 329, 330.
[c] 2 Rol. Abr. 102. Lett. K. Vide 2 Keb. 820 pl. 30.
[d] 1 And. 139, 140.
[e] Styl's Rep. 329, 330.
[f] 2 And. 128, 129, 130.
[g] Dominus Rex *versus* Howkins *Mich.* 3. *Geo.*

Sect. 77. As to the sixteenth Particular, *viz.* Whether the Penalty of a penal Statute, may be compounded or granted over? It is enacted by 18 *El.* 5. *That no Informer, or Plaintiff, shall, or may compound or agree with any Person or Persons, that shall offend, or shall be surmised to offend against any penal Statute, for an Offence committed or pretended to be committed; but after Answer made in Court unto the Information or Suit in that Behalf exhibited, or prosecuted: Nor after Answer, but by the Order or Consent of the Court in which the same Information or Suit shall be depending; on Pain that whosoever shall offend, in making of Composition, or other Misdemeanor, contrary to the true Intent and Meaning of this Statute, or shall by Colour or Pretence of Process, or without Process, upon Colour or Pretence of any Matter of Offence against any penal Law, make any Composition, or take any Money, Reward, or Promise of Reward, for himself, or to the Use of any other, without Order or Consent of some of her Majesty's Courts at* Westminster, *and shall be thereof convict, shall stand on the Pillory,* &c. *and for ever be disabled to pursue, or be Plaintiff or Informer in any Suit or Information upon any Statute Popular or Penal; and shall also forfeit ten Pounds,* &c.

Sect. 78. It seems [h] clear, both from the Preamble and the whole Tenor of the Statute, that it extends only to Suits by Common Informers, and not to those by a Party grieved.

[h] *See the three last Sections of the Statute, and the 22d, 47th, and 49th Sections of this Chapter.*

Sect.

[a] Hutt. 35.

Sect. 78. But it hath been [a] holden, That it extends as well to subsequent penal Statutes, as to those which were in being when it was made. [b] And also that it extends to the compounding of Suits commenced in Courts which have no Jurisdiction, as much as if they had a Jurisdiction.

[b] 1 Keb. 106. pl. 42. 1 Sid. 311.

Sect. 79. It is enacted and declared by 21 *Jac.* 1. 3. (which, as to these Matters, appears both by the Preamble, and Body of the Statute, and many former [c] Resolutions, to be made in Affirmance of the Common Law) *That all Commissions, Grants, Licences, Charters, and Letters Patents, made or to be made to any Person or Persons, Bodies politick or Corporate whatsoever, of Power, Liberty, or Faculty, to dispense with any others, or to give Licence or Toleration, to do, use, or exercise any Thing against the Tenour or Purport of any Law or Statute, or to give or make any Warrant for any such Dispensation, Licence, or Toleration to be had or made, or to agree, or compound with any others for any Penalty or Forfeitures limited by any Statute, or of any Grant or Promise of the Benefit, Profit, or Commodity of any Forfeiture, Penalty, or Sum of Money, that is or shall be due by any Statute, before Judgment thereupon had, and all Proclamations, &c. any way tending to the furthering of the same, are altogether contrary to the Laws of this Realm, and shall be utterly void, &c.* And it is farther enacted, *That all such Commissions, &c. shall be examined, heard, tried and determined by, and according to the Common Laws of this Realm, and not otherwise.*

[c] 7 Co. 36, 37. Moore 763. Hob. 183. 3 Inst. 186, 187. 2 Rol. Abr. 187. pl. 12. *seems contrary.*

Sect. 80. But is provided, *That this Act shall not extend to any Warrant or Privy Seal, made or directed by the King to the Justices of either Bench, or the Exchequer, or of Assise, or of* Oyer *and* Terminer *and Gaol-Delivery, or Peace, or other Justices for the Time being, having Power to hear and determine Offences done against any penal Statute, to compound for the Forfeitures of any penal Statutes, depending in Suit and Question before them, or any of them respectively, after Plea pleaded by the Defendant.*

[d] 3 Inst. 178.

Sect. 80. It is said by Sir [d] *Edward Coke*, That such Justices, by such Warrant, *&c.* can make such Composition for the Use of the King only; However it seems, That by 18 *El.* they may give Leave to an Informer to [e] compound with a Defendant after Plea pleaded.

[e] Vide supra, Sec. 64, 65, 66.

Sect. 82. Also it is provided, *That the said Act shall not extend to any Grants, Letters Patents, or Commission heretofore granted, of, for, or concerning the licensing of the keeping of any Tavern or Taverns, or selling, uttering or retailing of Wines to be drunk, or spent in the Mansion-House or Houses, or other Place, in the Tenure or Occupation of the Party or Parties, so selling or uttering the same; or for or concerning the making of any Compositions for such Licences, so as the Benefit of such Compositions be reserved and applied, to and for the Use of his Majesty, his Heirs or Successors, and not to the private Use of any other Person or Persons.*

CHAP. XXVII.

Of Proceſs.

AND now I am come to ſuch Proceſs as is to be awarded upon an Appeal, Indictment, or Information; for the better underſtanding the Nature whereof, (having premiſed that it ſeems plain, from the Nature of the Thing, that there can be [a] no need of it where the Defendant is preſent in Court, but only where he is abſent,) I ſhall conſider it,

[a] Lamb. B. 4. Ch. 8. Dalt. Ch. 132. Cromp. 150. a.

1. In General; without any particular Regard to Proceſs of Outlawry.
2. In Particular; with Regard to ſuch Proceſs only.

And *Firſt*, I ſhall examine the Nature of ſuch Proceſs in general, without any particular Regard to Proceſs of Outlawry, under the following Particulars;

1. Where it is well awarded into a County different from that wherein the Court ſits from which it is awarded.
2. What kind of Proceſs ſhall iſſue on an Indictment, Appeal, and Information.
3. In what Manner it is to be executed.
4. What is required by Statute, in Relation to Proceſs on Informations.
5. What is the proper Proceſs on a Default.
6. What after a Removal by *Certiorari*.
7. Where it ſhall be ſaid to be diſcontinued, or miſcontinued, or put without Day.
8. How far an Error in Proceſs is fatal.

Sect. 1. As to the firſt Particular, *viz.* Where ſuch Proceſs is well awarded into a County different from that wherein the Court ſits from which it is awarded: It ſeems [b] to be a good general Rule, That no Proceſs without Writ can be well awarded on any Indictment, or Appeal, *&c.* from any Court, out of the County wherein it ſits: But it ſeems agreed, [c] That ſuch Proceſs by Writ may, by the Common Law, be well awarded into any County of *England*, either by the Court of King's Bench, or by Juſtices of *Eyre*, upon an Indictment, *&c.* before them. Alſo it is clear, That Juſtices of *Oyer* and *Terminer* have the ſame Power, in Relation to Perſons indicted or appealed before them of Felony, by Force of 5 *Ed.* 3. 11. whereby it is recited, *That in Times paſt ſome Perſons appealed or indicted of divers Felonies in one County, or outlawed in the ſame County, had been dwelling, or received in another County, whereby ſuch felonious Perſons indicted and outlawed, had been encouraged in their Miſchief, becauſe they might*

[b] 19 Aſs. pl. 6. Fitz. Barr. 279. Bro. Juriſ. 105. Vide Fitz. Aſſiſe, 446.
[c] S.P.C. 146. a. H. P. C. 196. Vide ſupra, Ch. 24. Sect. 22.

not be attached in another County; and thereupon it is enacted, *That Juſtices aſſigned to hear and determine ſuch Felonies, ſhall direct their Writs to all the Counties of* England, *where need ſhall be to take ſuch Perſons indicted.*

Sect. 2. It is obſervable, That the Miſchief complained of in the Preamble of this Statute relates as well to Perſons appealed, as to thoſe who are indicted; and therefore it ſeems reaſonable to conſtrue them alſo to be within the Meaning of the Purview, tho' they be not within the Letter of it, which extends only to Perſons indicted.

[a] Vide Crom. Juſtice, 149. b. Lamb. B. 4. Ch. 8.
[b] Vide ſupra, Ch. 8 Sect. 32.

Sect. 3. It ſeems queſtionable, [a] Whether Juſtices of Peace, being aſſigned [b] by their Commiſſion to hear and determine Felonies, are as well within the Meaning as Letter of this Statute? For, as on the one Side it may be argued, That this being a remedial Law, ought to receive as favourable and large an Interpretation as the Words will admit; ſo on the other Side it may be ſaid, That the Preamble of the Statute making mention as well of Perſons appealed, as of thoſe who are indicted, cannot be thought to have any manner of Regard to Juſtices of the Peace, before whom no Appeal lies; and nothing can be more reaſonable than to conſtrue one Part of a Statute by another.

Sect. 4. But by 22 *H.* 8. 5. Par. 5. *Juſtices of Peace of the Shire*, &c. *wherein any decayed Bridge ſhall be*, &c. *ſhall make Proceſs into every Shire within this Realm, againſt any Perſons who ought to amend ſuch Bridge, being preſented before them to be decayed*, &c. Alſo they have the like Power by other Statutes in many other Caſes, for which, not being ſo proper for this Treatiſe, I ſhall refer the Reader to the [c] Authors which more particularly treat of the *Office of a Juſtice of Peace.*

[c] Crompton's Juſtice, 151, 152. Lamb. B. 4. Ch. 8.

As to the ſecond Particular, *viz.* What Kind of Proceſs ſhall iſſue on an Appeal, Indictment, and Information; I ſhall endeavour to ſhew,

Firſt, Where ſuch Proceſs ought to have the Clauſe of *Non omittas.*
Secondly, In whoſe Name, and under what *Teſte*, it is to be made.
Thirdly, What is the proper Proceſs on Indictments for Crimes of an Inferior Nature.
Fourthly, What is the proper Proceſs on Informations.
Fifthly, What is the proper Proceſs on Appeals, and on Indictments of Treaſon, Felony and Mayhem.
Sixthly, How many Days there ought to be between the *Teſte* and Return of ſuch Proceſs.

Sect. 5. As to the firſt Point, *viz.* Where ſuch Proceſs ought to have the Clauſe of *Non omittas*: It is laid [d] down in ſome Books as a general Rule, That in every Suit, to which the King is a Party, the Proceſs ought to have the Clauſe, *Non omittas propter aliquam libertatem, &c.*

[d] Crompton's Juſt. 149. b. Lamb. B. 4. Ch. 8. Dalt. Ch. 132. 41 Aſs. 17. Bro. Franc. 18. Proceſs, 102. Fitz. Prerog. 21. Vide infra, Sect. 17.

Sect. 6. But I do not find this Rule obſerved as to all Kinds of Suits by the King, in the beſt Precedents; for tho' the ſaid Clauſe is mentioned in every Award of Proceſs on [e] Indictments (except only [f] one) and even on [g] Informations *qui tam*, in *Coke's Entries*; yet it is omitted in all the Awards of Proceſs I can find on Informations of [h] Intruſion on the King's Lands, or of [i] Trover and Converſion of his Goods; and yet theſe are at leaſt as much, if not more properly, the Suits of the King, than the former.

[e] Coke's Ent *from* 352, *to* 363. [f] Co. Ent. 358. b. [g] Co. Ent. 365, a. 366, a. 367, a. 368. a. [h] Co. Entr. 372, a. 376, a. 379, a. 381, a. 387. b. [i] Co. 16, 17. [i] Coke's Entr. 390. b.

Sect. 7. As to the ſecond Point, *viz.* In whoſe Name, and under what *Teſte* ſuch Proceſs is to be made. It is expreſly [a] enacted by 27 *H.* 8. 24. *Par.* 3. *That all manner of Proceſs upon Indictments of Treaſon, Felony, or Treſpaſs to be made in every County-Palatine, and other Liberty, ſhall be made only in the Name of the King; and that every Perſon having ſuch County-Palatine, or any other ſuch Liberty, to make Proceſs,* &c. *ſhall make the* Teſte *in the Name of the Perſon that hath ſuch County-Palatine,* &c.

[a] Vide 4 Inſt. 205.

Sect. 8. And as to Proceſs on Indictments in any other Courts, there can be no [b] Doubt but that it ought alſo to be in the Name of the King: And if it iſſue from the Court of King's Bench, it ſeems [c] clear, That it ought to be under the *Teſte* of the Chief Juſtice, or of the Senior Judge of the Court, if there be no Chief Juſtice; and if it iſſue from any other Court, there ſeems to be the ſame Reaſon that it ought to be under the *Teſte* of the firſt in the Commiſſion; and that ſuch a *Teſte* will be ſufficient. It is holden indeed by [d] *Lambard*, That every Proceſs on an Indictment before Juſtices of Peace, ought to be under the *Teſte* of ſome two Juſtices: But there are Precedents to the contrary in [e] *Crompton*; and even in [f] *Lambard*. Neither do the [g] Authorities cited by *Lambard* ſeem to come up fully to his Point; for they ſeem to amount to no more than this, That one Juſtice of the Peace cannot award Proceſs on an Indictment, but that two of them at the leaſt muſt do it, and that ſitting the Court in the Seſſions: And indeed it ſeems plainly to appear, from the * Commiſſion itſelf, That one Juſtice has no Authority either to take an Indictment, or to proceed upon it: But I do not ſee the Conſequence, That becauſe an Indictment cannot be taken, nor proceeded upon, by leſs than two, therefore the Proceſs cannot be teſted by leſs than two.

[b] Vide Lamb. B. 4. Ch. 8. Dalt. Juſt. Ch. 132.
[c] Finch of Law, 436. Cro. Ca. 393.
[d] Lamb. B. 4. Ch. 8. *See* Dalt. Juſt. Ch. 132.
[e] Crompton, 232, 233.
[f] *See the printed Precedents in the End of his Eirenarcha.*
[g] Bro. Peace, 6, 7. Vide 14 H 7. 8. b. Crompt. 151. b.
* Vide ſupra, Ch. 8. Sect. 24, 25. Dalt. Ch. 132.

Sect. 9. As to the third Point, *viz.* What is the proper Proceſs on Indictment or Crimes of an inferior Nature. It ſeems clear, both from the [h] Books which ſpeak of this Matter, and the conſtant Courſe of [i] Precedents, That a *Venire Facias* (which is but in Nature of a Summons to cauſe the Party to appear) is a proper Proceſs to be firſt awarded on an Indictment for any Crime (whether againſt the Common Law, or Statute) under the Degree of Treaſon, Felony, or [k] Maihem, except in ſuch Caſes wherein other [l] Proceſs is directed by ſome Statute. Alſo ſuch a *Venire* ſeems to be the firſt proper Proceſs on an [m] Information in the Crown-Office, for a Debt claimed by the King, as having been forfeited by a *felo de ſe*.

[h] Crompt. 150, b. 151. Dalt. ch. 132. Lamb. B. 4. Ch. 8. Fitz. Aſſiſe, 17. 32 H. 6. 10. b.
[i] Co Entr. 358, pl. 10. 362, pl. 17, 18. 363. a.
[k] Finch of Law, 356.
[l] Vide ſupra, Ch. 23. Sect. 151. Ra. Ent. 263. pl. 11.
[m] 1 Saund. 271.

Sect. 10. If it appear by the [n] Return to ſuch *Venire*, that the Party has Lands in the County whereby he may be diſtrained, the [o] Diſtreſs infinite ſhall be awarded from Time to Time, till he do appear, and by Force hereof he ſhall [p] forfeit on every Default ſo much as the Sheriff ſhall return upon him in Iſſues. But if a *Nihil* be returned on ſuch a *Venire*, a [q] *Capias, alias* and *pluries*, ſhall iſſue, *&c.*

[n] Crompt. 150, 151. Lambert, B. 4. Ch. 8. Dalt. Juſt. Ch. 132. Dalt. Sheriff, Ch. 34, 78.
[o] Regiſter Judicial, 1. Finch, 352, 353.

Sect. 11. It is ſaid in *Fitzherbert*'s [r] *Abridgment, That in* Oyer *and* Terminer, *if the Party at the firſt Day make Default, a Man may have a* Venire Facias, *or a* Pone per vadios, &c. *at his Election*; the Meaning whereof perhaps may be this, That if the Defendant, being ſummoned on the *Venire*, do not appear, the Proſecutor may either take out a ſecond *Venire*, or a [s] *Pone per vadios, &c.* But I cannot [t] find any expreſs Authority, or Precedent, to juſtify the making either a *Pone per vadios, &c.* or a *Ca-*

Dalton's Sheriff, Ch. 34, 78. Dalt. Juſtice, Ch. 132. [p] Vide 2 Danv. Ab. 296, f. 5. 2 Inſt. 453, 454. [q] Lamb. B. 4. ch. 8. Crompt. 150, 151. Fitz. Treſpaſs, 232. Dalt. Juſt. Ch. 132. 11 H. 6. 4. a. Finch of Law. 352. [r] Fitz. Proceſs, 188. [s] Vide Finch of Law. 352. [t] Vide ſupra, Sect. 9, 10. Fitz. Pro. 213. Treſ. 232. 29 Ed. 4. 18. a. b.

pias,

pias, the firſt Proceſs on any Indictment under the Degree of Maihem, or Felony, *&c.* except only where ſuch Proceſs is expreſly given by ſome Statute.

Sect. 12. As to the fourth Point, *viz.* What is the proper Proceſs on Informations: It ſeems, That a *Capias* againſt a [a] Commoner, and a [b] *Diſtringas* againſt a Peer, are the firſt proper Proceſſes on an Information for an Intruſion on the King's Lands, or for a [c] Trover and Converſion of his Goods: And either an [*] Attachment or [d] *Subpœna*, at the Election of the Informer, were by the Common Law proper Proceſſes on all Informations *qui tam* on Popular Statutes. And ſo was a [e] Summons in all Originals in Debt on ſuch Statutes, in the ſame Manner as in an Action of Debt at [f] Common Law; and an [g] Attachment, or *Pone per vadios, &c.* in other Actions on ſuch Statutes, in the ſame Manner as in Actions upon the Caſe, and in Actions of Treſpaſs at [h] Common Law.

Sect. 13. And it is enacted by 21 *Jac.* 1. 4. By which all Popular Suits on penal Statutes are reſtrained to their proper Counties, as is ſhewn at Large in the precedent [i] Chapter of Informations, *That the like Proceſs in every Popular Action, Bill, Plaint, Information, or Suit, to be commenced, ſued or proſecuted, by Force of, or according to the Purport of the ſaid Act, be had and awarded, to all Intents and Purpoſes, as in an Action of Treſpaſs* Vi & Armis *at the Common Law.* And [k] conſequently the Proceſs in all ſuch Suits muſt now be by Attachment or *Pone per vadios, &c.* and after by Diſtreſs infinite, where by the Return, the Party appears to be ſufficient, [l] otherwiſe by *Capias.*

Sect. 14. It is as I take it, the uſual Practice of the Crown-Office, on a Criminal Information, firſt, to award a *Subpœna*; and after the Return thereof, if no Appearance be entred in four Days, and an Affidavit be made of the Service of the *Subpœna*, to make out a *Capias* of Courſe, where the Defendants are informed againſt in their private Capacity, and a [m] *Diſtringas*, where they are ſued as a Corporation aggregate.

Sect. 15. As to the fifth Point, *viz.* What is the proper Proceſs on Appeals, and on Indictments of Treaſon, Felony and Maihem: It ſeems certain, That a *Capias* is the firſt Proceſs in all Indictments of [n] Treaſon or Felony, and in [o] all Appeals, whether of Maihem or Felony; from whence it ſeems reaſonable to conclude, That it ought alſo to be the firſt Proceſs in an Indictment of Maihem, as well as of Felony or Treaſon.

Sect. 16. As to the ſixth Point, *viz.* How many Days there muſt be between the *Teſte* and Return of all ſuch Proceſs: It ſeems agreed, That there ought to be at leaſt fifteen Days between the *Teſte* and Return of every Proceſs awarded from the King's Bench into any [p] Foreign County: But that this is not required in Proceſs awarded into the ſame County where in the Court ſits.

Sect. 17. As to the third Particular, *viz.* It what Manner ſuch Proceſs is to be executed: It is laid down as a [q] general Rule, That whereever the King is a Party to the Suit, (as he certainly is to all Informations and Indictments) the Proceſs ought to be executed by the Sheriff himſelf, and not by the Bailiff of any Franchiſe, [r] whether it have the Clauſe *Non omittas, &c.* or not, and whether the Defendant be within a Franchiſe, or in the County at large; for the King's Prerogative ſhall be preferred to any Franchiſe: But it is ſaid, [s] That this is to be intended only where in the Grant of the Franchiſe, no mention is made of Cauſes to which the King is a Party.

[a] Coke's Ent. 372, a. 376, a. 379, a. 381, a.
[b] 1 Co. 16. b.
[c] Co. Entr. 387. b.
[d] Co. Ent. 390. b.
[*] Coke's Ent. 365, a. 366, a. 367, a. 368.
[e] Co. Ent. 370, b. 371, b. 395, a.
[f] 1 And. 48.
[g] Co. Entr. 158, a. 164, b. 166. a. Ra. Entr. 599. pl. 2, 3.
[h] Finch of Law, 352.
[i] Co. Entr. 43, b. 44. pl. 3. 46, a. 348, a. 349, a. 350, a. 351. a. Ra. Ent. 406. a. b.
[k] Finch of Law, 355.
[l] Vide Ch. 26. Sect 31 to Sect. 38.
[m] See Finch of Law, 345, 352, 355.
[n] 1 Rol. Abr. 463, pl. 11. 780. pl. 6 793, pl. 4. *the ſame Caſe.* Palm. 449. 1 Keb. 159, pl. 109. 2 Rol. Abr. 277. D.
[o] Vide Salk 174. pl. 15. 3 Mod 265.
[p] Co. Ent. 50. pl. 1. Fitz. Exigent 28. Finch of Law. 246. 351. Ra. Entr. 45. pl. 1. *there is a precedent ſeemingly contrary.*
[q] Co. Litt. 134. b. Salk. 174 pl. 15. 1 Lev. 61. 9 Co. 118 b. Dalt. Ch. 132. Bro. Franchiſe, 18.
[r] 41 Aſs. 17. Bro. Proceſs, 102. Fitz. Prerog. 21.
[s] Bro. Prerog. 109. Franch. 31.

Sect.

Sect. 18. As to the fourth Particular, *viz.* What is required by Statute in Relation to Proceſs on Informations: It is enacted by *4 & 5 Will. & M.* 18. That no Proceſs ſhall iſſue on any Information to be exhibited by the Maſter of the Crown-Office, till the Proſecutor have given ſuch a [a] Recognizance as by the ſaid Act is directed. Alſo it is enacted by *18 El.* 5. That [b] no Proceſs ſhall iſſue on any Information on a penal Statute, till a ſpecial Note be made of the Time when ſuch Information was exhibited, *&c.* But theſe Matters having been already handled in the Chapter of *Informations*, in the Places cited in the Margin, I ſhall refer the Reader thither, for the fuller Conſideration of them.

[a] Vide ſupra, Ch. 26. Sect. 5, 6, 10.

[b] Vide ſupra, Ch. 26. Sect. 39, 40, 41, 43, 44, 46, 47.

Sect. 19. As to the fifth Particular, *viz.* What is the proper Proceſs upon a Default: It ſeems, That if a Defendant appear to an [c] Indictment or [d] Appeal of Felony, and afterwards, before iſſue joined, make an Eſcape, whether from his [e] Bail, or from an actual [f] Priſon, the Common *Capias*, *alias* and *pluries*, *&c.* ſhall be awarded againſt him, unleſs there had been an Exigent before, in which Caſe a new [g] Exigent ſhall be immediately awarded. And if a Defendant, againſt whom no Exigent had been before awarded, make ſuch Default after Iſſue joined, and an Inqueſt awarded to try it, it ſeems [k] that a *Capias*, *&c.* ſhall be awarded again him *ad audiendum juratam*, *&c.* and, as I take it, the ſame Day on which the *Capias* is returnable, ſhall be given to the Inqueſt, (for it ſeems [i] agreed, That the Inqueſt ſhall never be taken by Default in the Caſe of Felony, as it may for an inferior Crime.) But in ſuch Caſe, if the Exigent had before been awarded, it [k] ſeems, That a new Exigent in the Common Form ſhall be awarded; and that thereby both the Iſſue and Inqueſt are without Day. And it is ſaid in ſome [l] Books, That ſuch Exigent ſhall be *Ad audiendum judicium*: But this ſeems queſtionable; ſince it ſeems to be [m] agreed, That the Defendant may ſave himſelf from Judgment by a Render at any Time before the Return of the Exigent.

[c] H. P. C. 211.

[d] 16 Aſſ. pl. 13. 26 Aſſ. pl. 51.

[e] 16 Aſſ. pl. 13. Fitz Exigent 10.

[f] *But this is made a Query.* Crompt. 150. b. 26 Aſſ. pl. 51.

[g] 19 H. 8. 1. pl. 1. Bro. Proceſs, 1. *ſeem to be contrary.*

[h] S. P. C. 70. Lett. E. F. Bro. waiver de Choſes, 39. Fitz Exigent 10. Proceſs, 113, 127.

[i] S. P. C. 70. Letter E. Fitz Exigent 10. Coro. 173. Bro. waiver de choſes, 39. 16 Aſſ. pl. 13. Bro Appeal, 54.

[k] 26 Aſſ. pl. 51. S. P. C. 70 Letters E. F. H. P. C. 211. Bro. waiver de choſes, 39. Fitz. Exigent 10. Coro. 196.

[l] 26 Aſſ. 51. Crompt. 150. b. Fitz. Croro. 196.

[m] Fitz. Exigent, 10. Bro. waiver de choſes, 39. Coro 192. H. P. C. 211.

Sect. 20. It is ſaid [n] by Sir *Mathew Hale*, That the Defendant in ſuch Caſe appearing on the Exigent, ſhall plead *de novo*, becauſe the Iſſue and Inqueſt are *ſine die* by the Award of the Exigent; but this ſeems to be made a Query by [o] *Staundforde*, and the [p] Authorities whereon it ſeems to be chiefly founded, are very obſcure; and as it ſeems may well be underſtood in this [q] Senſe, That the Court may cauſe the ſame Inqueſt to come to try the ſame Iſſue, which (according to [r] *Brook*) tho' it be put without Day by the Exigent, is not waived by it, unleſs the Defendant fail to render himſelf before the Return of it.

[n] H. P. C. 211.

Sect. 21. Before I proceed to the ſixth Particular, *viz.* What is the proper Proceſs to be awarded after a Removal by *Certiorari*, it may not be improper to premiſe ſome Things concerning the Nature of a *Certiorari*; as,

1. To what Courts it lies
2. Where the Court of King's Bench uſes a Diſcretionary Power in granting, denying, and filing it.
3. What Reſtraints are put upon it by Statute.
4. How the *Fiat* for it is to be ſigned.
5. To whom it ought to be directed.

[o] S. P. C. 70. Letters E. F. [p] Fitz. Exigent 10. 16 Aſſ. pl. 13. [q] Vide Fitz. Coro. 173. [r] Bro. waiver de choſes, 39. Proceſs, 148. Exigent 67.

6. Where a Record may be removed into the Court of King's Bench without it.
7. What is be done by a Defendant before the Allowance of it.
8. How far it is a *Superſedeas* to the Court below.
9. In what Manner it is to be returned.
10. Where a Record is removed by it.
11. What is to be done by the Court above, where the Record is not removed.

As to the firſt Point, *viz.* To what Courts a *Certiorari* lies: I ſhall endeavour to ſhew,

1. Whether it lie to all inferior Courts in general.
2. Whether to thoſe of the *Cinque-Ports.*
3. Whether to thoſe of *Wales.*
4. Whether to thoſe of *London.*

Sect. 22. As to the firſt Point, *viz.* Whether regularly it lie to all inferior Courts in general: It ſeems agreed at this Day, That regularly the Court of King's Bench having a general [a] Superintendency over all other Courts of Criminal Juriſdiction, whether they be of an antient or [b] newly created Juriſdiction, may award a *Certiorari* as well as the Court of Chancery, to remove the Proceedings before any ſuch Courts, unleſs the Statute or [c] Charter which erects them, expreſly give them an abſolute Judicature, exempt from ſuch Superintendency; as the [d] Statutes concerning the Commiſſioners of the *Cambridgſhire Fens, &c.* are ſaid by ſome to have done.

Sect. 23. And accordingly it ſeems to be agreed, That ſuch a *Certiorari* lies to [e] Juſtices in *Eyre*, and alſo to thoſe of [f] Gaol-Delivery, or of a [g] County-Palatine, and to the [h] College of Phyſicians, having a ſpecial Power by Statute to fine and impriſon for certain Offences; and to Juſtices of Peace, *&c.* even in ſuch [i] Caſes which they are impowered by Statute finally to hear and determine, and alſo to [k] Commiſſioners of Sewers, notwithſtanding the Clauſe in 13 *El.* 9. *Par.* 5. *That the ſaid Commiſſioners ſhall notbe compelled to make any Certificate or Return of their Commiſſions, or of their Ordinances, Laws, or Doings*, &c. For it hath been adjudged, [l] That this is intended to exempt them from returning their Orders into Chancery, as by the Statute of *H.* 8. they were obliged to do, and ſhall not be conſtrued to take away the Superintendency of the Court of King's Bench, without expreſs Words.

Sect. 24. As to the ſecond Point, *viz.* Whether a *Certiorari* lie to the Courts of the *Cinque-Ports*? It hath been adjudged, That ſuch a *Certiorari* lies to ſuch Courts to remove an [m] Indictment of Sodomy there found, or an [n] Order made by the Juſtices of Peace at a Seſſions there holden. It is ſaid indeed, by [o] *Rolle*, That the Reaſon why ſuch an Indictment may be removed is, becauſe the Offence is made Felony by a late Statute, and therefore the Courts of the *Cinque-Ports* cannot hold Plea of it without a new Charter; by which it ſeems to be implied, That in his Opinion Indictments in ſuch Courts of Crimes whereof they have Juriſdiction, are not removable. But the other Books above-cited, ſeem to ſpeak generally of all Indictments, and to lay it down as a Rule, That the Pri-

[a] S. P. C. 70. 1 Salk. 144, pl. 3 146, pl. 7 148. 2 Lev. 86. 1 Lev. 312. Contr. 41 Aſſ. pl. 22. Br. Coro. 193. Certiorari, 8.
[b] 1 Salk. 144 pl. 3.
[c] Cro Ca. 265. 3 Mod. 93, 94.
[d] 1 Sid. 296. Contra 1 Keb. 43. pl. 87. 2 Keb. 722. pl. 124.
[e] 1 Sid. 226. 2 Keb. 81, 82. 4 Inſt. 294, 295.
[f] 1 Salk. 144. pl. 2
[g] 3 Mod. 229 230. 2 Lev. 223. 1 Salk. 146, pl. 7. 148.
[h] 1 Rol. Abr. 395 pl. 4, 5. Aleyn, 49. 5 & 6 Guil. & Mar. 11. Par 5.
[i] 1 Salk. 144. pl. 3.
[k] 3 Mod. 93, 94.
[l] 1 Salk. 145. pl. 6. 1 Keb. 129. pl. 85. March, 196, 197, 199. 291. 1 Rol. Raym. 186. [l] 1 Mod. 44, 45. 1 Lev. 288. 1 Ventr. 66, 67, 68. [m] Cro. Ca. 252, 253, 264. [n] 2 Lev. 86. Sid. 1356. 3 Keb. 154. [o] 1 Rol. Ab. 395. pl. 6.

vilege

vilege of the Courts of the *Cinque-Ports*, uſed Time out of Mind, that the King's Writ doth not run there, is to be intended only of Civil [a] Cauſes between Party and Party.

Sect. 25. As to the third Point, *viz.* Whether a *Certiorari* lie to the Courts of *Wales*? It ſeems to be ſettled, That ſuch a *Certiorari* lies to remove any Indictment taken in *Wales* for a Crime not capital, either at the [b] Grand Seſſions, or at a [c] Seſſions of the Peace: But it is [d] ſaid, That it hath never been granted to remove an Appeal from *Wales*; [e] neither doth it ſeem to be clearly ſettled, That it lies to remove an Indictment of Felony from thence; for ſuch Indictments are never [f] quaſhed, as Indictments for inferior Crimes are. Neither do I find it agreed [g] in what Manner the King's Bench ſhall proceed on any Indictment removed from *Wales*. But it is ſaid, That an Indictment of Felony ſo removed, may be tried in the next [h] *Engliſh* County, by force of [i] 26 *H.* 8. But it ſeems [k] agreed, That this Statute extends not to Appeals.

Sect. 26. As to the fourth Point, *viz.* Whether a *Certiorari* lie to the Courts of *London*? It ſeems to be admitted in the late [l] Reports, That a *Certiorari* may be granted to remove any Indictment from *London* or *Middleſex*; but it is [m] ſaid, That he who prays it ought to give three Days Notice to the other Side: Alſo it is ſaid, [n] That by a *Certiorari* to *London*, the Tenour of the Indictment only ſhall be removed by the City-Charters. And it ſeems, [o] That anciently that City inſiſted on a Privilege, That all Indictments and Proceedings for any Cauſe, except Felony, ſhould be tried and determined there, and not elſewhere.

Sect. 27. As to the ſecond Particular, *viz.* Where the Court of King's Bench uſes a Diſcretionary Power, in granting, denying and filing a *Certiorari*. It hath been [p] adjudged, That where-ever a *Certiorari* is by Law grantable for an Indictment, the Court is bound of Right to award it at the Inſtance of the King, becauſe every Indictment is the Suit of the King, and he has a Prerogative of ſuing in what Court he pleaſes. But it ſeems to be agreed, That it is left to the Diſcretion of the Court either to grant or deny it at the Prayer of the Defendant: And agreeably hereto, it is laid [*] down as a general Rule, That the Court will never grant it for the Removal of an Indictment before Juſtices of Gaol-Delivery, without ſome ſpecial Cauſe; [q] as where there is juſt Reaſon to apprehend that the Court below may be unreaſonably prejudiced againſt the Defendant; [r] or where there is ſo much Difficulty in the Caſe, that the Judge below deſires that it may be determined in the King's Bench, [s] or where the King himſelf gives a ſpecial Direction that the Cauſe ſhall be removed; or where the [t] Proſecution appears to be for a Matter not properly criminal.

Sect. 28. It ſeems, [u] That the Court will not ordinarily, at the Prayer of the Defendant, grant a *Certiorari* for the Removal of an Indictment of Perjury, or Forgery, or other heinous Miſdemeanor; for ſuch Crimes deſerve all poſſible Diſcountenance, and the *Certiorari* might delay, if not wholly diſcourage their Proſecution.

Sect. 29. Alſo it is ſaid, [x] That the Court of King's Bench will never grant a *Certiorari* for a Conviction of Recuſancy upon a Default at Seſſions; be-

[a] Vide Cro. El. 910, 911. Palm. 54, 55. 56, 96. Cro. Jac. 531. 1 Sid. 432. pl. 21. Hardr. 475, 476.
[b] 1 Rol. Abr. 394. pl. 1, 2. 2 Ro. Re. 28, 29. Cro. Jac. 484. Poph. 144. 2 Keb 471. pl. 63.
[c] Cro. Jac. 248. [c] 1 Salk. 146. pl. 7.
[d] Cro. Jac. 248. 2 Keb. 797, 798.
[e] 1 Mod. 64, 68. 2 Keb. 685, pl. 8. 724. Cro Ca. 331, 332. 1 Rol Abr. 394 pl. 3. 1 Ventr. 93, 146.
[f] Vide Ch. 25. Sect 148.
[k] Vide 1 Rol. Abr. 394. B. 1, 2, 3. 2 Keb. 685, pl 8. 724.
[l] 2 Keb. 798, 799. 1 Vent. 146. *Quære* 1 Rol. Abr. 394, 395.
[i] Supra, Ch. 25. Sect. 39, 40.
[k] Cro. Ca. 248. 2 Keb. 797, 798. 1 Vent. 146. *See* B. 1. Ch. 31. Sect 41. 1 Raym. 74. 1 Keb. 352. pl. 20. 3 Mod 230, &c. Hardr. 409, 410. Vide Supra, *1 Salk. 144.
[t] 1 Salk. 151.

6 Mod. 246. Vide 5 & 6 W. & M. 11. [m] Raym. 74. [n] 1 Keb 252. pl. 20. 1 Sid. 155, 230. Ch. 25. Sect. 99. [o] Cro. Ca. 128, 265. [p] Term. Paſch. 5 Georg. Vide 1 Vent. 63. 1 Mod. 41. pl. 2. 1 Keb. 4. [q] 1 Salk. 150. pl. 18. [r] 1 Salk. 149. pl. 15. [s] 1 Vent. 63. 1 Mod. 41. pl. 20. [u] 1 Sid. 54. pl. 19. [x] 1 Salk. 145. pl. 5.

cauſe

* 3 Jac. 1. 4 Par. 9. Vide B. 1. Ch. 10. Sect. 23.

cauſe by the * Statute ſuch Convictions are to be removed into the Exchequer, and from thence Proceſs is to be awarded upon them. But the Court of King's Bench cannot proceed upon them, and therefore will not ſuffer them to come thither, leſt the Statute ſhould be evaded.

Sect. 30. It ſeems from the *Year-Book* of 16 *E.* 4. That it is a good Objection againſt the granting a *Certiorari*, that iſſue is joined in the Court below, and a *Venire* awarded for the Trial of it; for it appears by that [a] Book, where a *Certiorari* had been granted in ſuch a Caſe, that the Court being afterwards appriſed of the Matter, remanded the Cauſe.

[a] 16 Ed. 4, 5 pl. 3. Bro Co 10. 162.

Sect. 31. It ſeems [b] agreed, That a *Certiorari* ſhall never be granted to remove an Indictment or Appeal after a Conviction, unleſs for ſome ſpecial Cauſe; as where the Judge below is doubtful what Judgment is proper to be given; for unleſs there be ſome ſuch Reaſon, the Judge who tried the Cauſe, ſhall not be prevented from giving Judgment in it; for it cannot be intended but that he is beſt acquainted with the Circumſtances of it, and conſequently beſt able to judge what Fine, or other Puniſhment is proper for it.

[b] 1 Salk. 149 pl. 15. 6 Mod. 17.

Sect. 32. But it hath been adjudged, [c] That a *Certiorari* for the Removal of a Preſentment before Juſtices in *Eyre*, of a Matter which is inquirable and puniſhable by the Foreſt Law only, ſhall not be granted before, but only after Conviction; for if it ſhould be granted before, the Offence would be diſpuniſhed; but it may be granted after Conviction, in order to give the Party, the Right of whoſe Freehold is concerned in it, an Opportunity ſo far to [d] traverſe it.

[c] 1 Sid. 296. 2 Keb. 81, 82.

[d] Vide Fitz Aſſ. 442. 4 Inſt. 294, 295. 21 Ed. 3. 48. pl. 70. Bro. Foreſt 3.

Sect. 33. The Court has [e] refuſed to grant a *Certiorari* to remove a Recognizance of Appearance before Juſtices of *Oyer* and *Terminer*, &c. becauſe the Court below is moſt proper to judge, upon the whole Circumſtances of the Caſe, which are equitably to be conſidered, whether it ought to be eſtreated or not.

[e] 1 Sid. 296. 2 Keb. 81, 82.

Sect. 34. There is a Rule in the Court of King's Bench, That no Order of Commiſſioners of Sewers ought to be filed without Notice given to the Parties concerned. Alſo it is every [f] Day's Practice of that Court, before it will ſuffer the Return of a *Certiorari* for the Removal of the Orders of ſuch Commiſſioners to be filed, to hear Affidavits concerning the Facts whereon they are grounded; and if the Matter ſhall ſtill appear doubtful, to direct the Trial of feigned Iſſues, and either to file the Return, or ſuperſede the *Certiorari*, and grant a *Procedendo*, as ſhall appear to be moſt reaſonable for the Trial of ſuch Iſſues, and to give [g] Coſts againſt the Proſecutor of the *Certiorari*, if it appear to have been groundleſs.

[d] *Dominus Rex verſus* Combs. Hill. 1 Georgii

[f] Vide 1 Salk. 145. pl. 5. 2 Keb. 137. pl. 1. *ſeems contrary*

[g] Vide 2 Keb. 500. pl. 63.

Sect. 35. As to the third Particular, *viz.* What Reſtraints have been put by Statute upon the granting a *Certiorari*. It is enacted by 1 & 2 *Ph. & M.* 13. pl. 7. *That no Writs of* Habeas Corpus, *or* Certiorari, *ſhall be granted to remove any Priſoner out of any Goal, or to remove any Recognizance, except the ſame Writs be* [h] *ſigned with the proper Hands of the Chief Juſtice, or in his Abſence, of one of the Juſtices of the Court out of which the ſame Writs ſhall be awarded or made, upon Pain that he that writeth any ſuch Writs, not being ſigned, as is aforeſaid, to forfeit for every ſuch Writ five Pounds.*

[h] Vide Salk. 150. pl. 19.

Sect. 36. Alſo it is enacted by 5 & 6 *Will. & Ma.* 11. *That in Term Time, no Writ of* Certiorari *whatſoever, at the Proſecution of any Party indicted, be granted out of the King's Bench, to remove any Indictment or Preſentment from any General or Quarter-Seſſions, before Trial, but upon Motion of Counſel, and by Rule of Court made in open Court.* But it is provided, *That in*

in Vacation ſuch Writ may be granted by any Juſtices of the ſaid Court, whoſe Names ſhall be endorſed thereon, and alſo the Name of the Perſon at whoſe Inſtance it is granted.

Sect. 37. It is enacted by 22 *Ca.* 2. 12. Par. 4. *That all Defects of Repairs of Cauſeys, Pavements, Highways, or Bridges, ſhall be preſented in the County only where ſuch Cauſeys,* &c. *lie, and not elſewhere; and that no Indictment or Preſentment ſhall be removed by* Certiorari, *or otherwiſe, out of the ſaid County, till ſuch Indictment or Preſentment ſhall be traverſed, and Judgment thereupon given.* And it is farther enacted by 3 *&* 4 *W. & M.* 11. *That all Matters concerning Highways,* &c. *ſhall be determined in the County where they lie, and not elſewhere; and that no Preſentment, Indictment, or Order made by Vertue of that Act ſhall be removed by* Certiorari, &c. But it is enacted by 5 *&* 6 *W. & M.* 11. *That if the Right or Title to repair ſuch Cauſeys,* &c. *may come in Queſtion, upon Suggeſtion and Affidavit of the Truth thereof, a* Certiorari *may be granted to remove ſuch Indictment or Preſentment into the King's Bench,* &c. upon the like Recognizance as is required by the ſaid Statute as to other [a] *Certiorari's*, for the Removal of Indictments from Seſſions, for which I ſhall refer the Reader to the forty-ſixth and following Sections. Alſo it hath been adjudged, That if the Seſſions manifeſtly exceed their Authority, in making Orders concerning Highways, ſuch [b] Orders may be removed by *Certiorari* into the King's Bench, and quaſhed.

[a] *See the Statute of* 13 *&* 14 *Car.* 2. 6. *Par.* 16.

[b] *See* B. 1. Ch. 67. Sect. 10.

Sect. 38. It is enacted by 7 *&* 8 *Will. & M.* 6. Made for the Recovery of ſmall Tithes before Juſtices of Peace, *That no Proceedings or Judgment by Vertue thereof ſhall be removed or ſuperſeded by any Writ of* Certiorari *out of any Court whatſoever, unleſs the Title of the Tithes,* &c. *ſhall come in Queſtion.* And in the Conſtruction hereof, it hath been adjudged, [c] That if the Party inſiſt on any Matter of Law before the Juſtice of Peace, which is any way doubtful, as on a Cuſtom in a Pariſh to be diſcharged of a certain kind of Tithe, *&c.* the Order may be removed within the Intent of the Statute.

[c] *Dominus Rex ver.* Furnace. *Termino Hill. ſexto Georgii.*

Sect. 39. And it is enacted by 12 *Car.* 2. 23. Concerning the Exciſe, *Par.* 35. *That no Writ of* Certiorari *ſhall ſuperſede Execution or other Proceedings, upon any Order by Juſtices of Peace in purſuance of that Statute, but that Execution, and other Proceedings, ſhall and may be had thereupon, any ſuch Writ, or Allowance thereof notwithſtanding.* And the like is generally enacted by other Statutes concerning the Revenue; for which I ſhall refer the Reader to the ſeveral Statutes.

Vide 1 Keb. 818. pl. 10.

Sect. 40. As to the fourth Point, *viz.* How the *Fiat* for a *Certiorari* is to be ſigned: It is ſaid, [d] That if a *Certiorari* be taken out in Vacation, and teſted of the precedent Term, the *Fiat* for it muſt be ſigned by ſome Judge of the Court, ſome Time before the Eſſoin-Day of the ſubſequent Term, otherwiſe it is irregular, and the Court upon Motion will order a *Procedendo*. But it is ſaid, That there is no need for any Judge to ſign the Writ of *Certiorari* it ſelf, but only in ſuch Caſes wherein it is required by Statute.

[d] 1 Salk. 150. pl. 19.

Sect. 41. As to the fifth Point, *viz.* To whom the Writ of *Certiorari* is to be directed. It ſeems, That notwithſtanding [e] regularly it ought to be directed to the Judge of the inferior Court, yet in ſome Caſes it may be directed to the proper [f] Officer known to have the Cuſtody of the Record to be removed, and in ſome other Caſes to [g] others, as ſhall be moſt agreeable to the uſual Courſe of approved Precedents, which [h] ſeems to be the beſt Guide whereby to judge of this Matter. And ac-

[e] 3 Keb. 13. pl. 17.

[f] 4 H. 6. 15. b. 16. a. S. P. C. 64. Letter B. Hob. 135. Dalt. ch. 134.

Style 371. Raſt. Entr. 110 pl. 4. 2 Lev. 223.

[g] *See the Caſes cited to the other Parts of this Section.*

[h] Dyer 163. pl. 56.

cordingly it ſeems, That for an Indictment or Confeſſion of an Approver before a Coroner, it ſhall be directed to the Coroner alone [a], and for an Appeal, both [b] to the Sheriff and Coroner; and for an Indictment in the *Cinque-Ports*, to the [c] Mayor and Jurats; and for an Indictment at an Aſſiſe in a County-Palatine, to the Chancellor of ſuch [d] County, who ſhall ſend for it to the Juſtices of Aſſiſe.

[a] Regiſter Judic. 74. b. 78. a. Raſt Ent 55. a. 263. b.
[b] Regiſter Judic. 76. Supra, Ch. 9. Sect. 42.
[c] Cro. Ca. 252, 253, 264.
[d] 2 Lev. 223. 3 Keb. 279.

Sect. 42. If the Perſon who ought to certify a Record, as a Juſtice of [e] Peace, *&c.* who hath taken a Recognizance, *&c.* or a [f] Judge of *Niſi Prius*, who hath taken a Verdict, or a [g] Coroner, who hath taken an Inqueſt, *&c.* happen to die, having ſuch a Record in his Cuſtody, it ſeems, That a *Certiorari* may be directed to his Executor or Adminiſtrator to certify it. [h] Alſo it hath been adjudged, That it may be directed to a Juſtice of Aſſiſe to certify a Record of Aſſiſe taken before his Companion in his Abſence.

[e] 2 Keb. 750. pl. 4. 8 H. 4, 3, a. 5. b. Cro. Jac. 669. 21 H. 7. 21. pl. 4.
[f] Dyer 163. pl. 54, 55, 56. Raſt. Entr. 439 pl. 14. 2 Inſt 424. 2 Rol. Abr. 629. Lett. S.
[g] Bro. Certiorari, 9. Indictment, 23. 43 Aſſ. pl. 40.
[h] Bro. Rec. 81. 11 H. 7. 5. pl. 21.

Sect. 43. All the Precedents, I am able to find, of *Certiorari's* for the Removal either of [i] Indictments, or * Recognizances from Seſſions, are directed either to the Juſtices of Peace for the County generally, or to ſome of them in particular by Name, and not to the *Cuſtos Rotulorum*; and according to [k] *Lambard*, they are never directed to him: Yet it is taken for granted in the [l] *Year-Book* of *H.* 7. That after a Recognizance for the Peace is brought in to the *Cuſtos Rotulorum*, it ſhall be certified by him. But ſurely, if the *Certiorari* be directed generally to the Juſtices of the County, or any one of them, it may be as well returned by any of them, as by the *Cuſtos Rotulorum*. And I queſtion whether it can be well [m] returned by him, unleſs he do it as Juſtice of Peace, naming himſelf ſuch? But if there are ſufficient Precedents to warrant the directing the *Certiorari* to him as *Cuſtos Rotulorum*, there can be no Doubt but that a Return by him as ſuch will be good.

[i] Regiſter Judic. 76. b. 77. a. Raſt. Ent. 263. b.
* Regiſter Origin. 90. F. N. B. 81. c.
[k] Lamb. B. 4. Ch. 7.
[l] 2 H. 7. 1. pl. 2.
[m] Vide Hob. 135.

Sect. 44. As to the ſixth Point, *viz.* Where a Record may be removed into the Court of King's Bench without any Writ of *Certiorari*: It ſeems agreed, † That if a Juſtice of Peace, or other Judge of Record, having taken a Recognizance, or Inquiſition, or recorded a Riot, or done any other executory Matter, within his Juriſdiction, have ſtill continued in the ſame Commiſſion, *&c.* without any Interruption, the Court of King's Bench ſhall receive ſuch Record from his Hands, without any Writ of *Certiorari*. Alſo it ſeems to be [n] agreed, That upon the Death of both the Juſtices of Aſſiſe, the Clerk of Aſſiſe may, without any *Certiorari*, bring in the Records of the Verdicts of *Niſi Prius*: But that the [o] Executors or Adminiſtrators of a Judge, can in no Caſe bring in a Record without a Writ to authoriſe them to do it. Alſo it ſeems to be [p] agreed, That no Record which is executed, as by Acquittal, *&c.* can be brought into a higher Court without a Writ. And it ſeems to be the ſtronger [q] Opinion, That neither a Juſtice who is out of Commiſſion at the Time, nor one who has been out of Commiſſion, but is afterwards reſtored, can certify any Record without a Writ of *Certiorari*.

† Dalt. Ch. 134. Lamb. B. 4. Ch. 7. 8 Ed. 4. 18. pl. 28. Bro. Record, 17. 64. 8 H. 4. 4. a. 5. b. Crompt. 132, 133. b.
[n] Dyer 163. pl. 54, 55, 56. 2 Inſt. 424.
[o] See March 112, 113.

Sect. 45. As to the ſeventh Point, *viz.* What is to be done by a Defendant before the Allowance of a *Certiorari*: It is enacted by 21 *Jac.* 8. *Par.* 7, 8. *That all Writs of* Certiorari *for the Removal of any Indictment of Riot, Forcible Entry, or of Aſſault and Battery, at any Quarter-Seſſions of the Peace, or otherwiſe, ſhall be delivered at ſome Quarter-Seſſions of the Peace in*

[p] 8 Ed. 4. 18. pl 28. Lamb. B. 4. Ch. 7 f. 517. Cromp. 133 b. [q] Dalt. Ch. 134. 8 H. 4. 4. a. 5. b. Bro. Garrantie d'Attorney, 9. Bro. Record, 17, 64. Bro. Certiorari, 9. Dyer, 163. pl. 54. Raſt. Ent. 438. a. b.

pen Court; and that the Party indicted ſhall, before the Allowance thereof, be-come bound to the Proſecutor in 10 *l. with ſuch ſufficient Sureties as the Juſtices of Peace, at their Quarter-Seſſions, ſhall think fit, with Condition to pay unto ſuch Proſecutor within one Month after Conviction, ſuch reaſonable Coſts and Damages as the ſaid Juſtices of Peace of ſuch Counties where ſuch Indictments ſhall be found in the ſaid Seſſions of the Peace, ſhall aſſeſs or allow; and in Default thereof, it ſhall be lawful for the ſaid Juſtices to proceed to Trial of ſuch Indictments, any ſuch Writs of* Certiorari *notwithſtanding.*

Sect. 46. And the like Recognizance in the Sum of 40 *l.* is required by 13 & 14 *Car.* 2. 6. *Par.* 16. concerning the Highways, on the Removal of every Indictment, *&c.* on that Statute.

Sect. 47. It is obſervable, That theſe Statutes do not [a] extend to all Indictments at Seſſions in general, but only to thoſe particular Ones therein mentioned: But this Defect was in a great Meaſure [b] ſupplied by the Rules of the Court of King's Bench, which, upon the Removal of an Indictment from *London* or *Middleſex*, required a Recognizance from the Defendant to carry down the Record to Trial the ſame Term, on which the *Certiorari* was returnable, or the Sittings after; and on the Removal of an Indictment from other Counties [c] required ſuch Recognizance for a Trial at the next Aſſiſes.

[a] 1 Keb. 225. pl. 38. 727. pl. 69.
[b] Vide 1 Keb. 33. pl. 88. 6 Mod. 246. 2 Salk. 526. pl. 3.
[c] Show. Rep. 336.

Sect. 48. And agreeably hereto, it is enacted by 5 & 6 *W.* & *M.* 11. and 8 & 9 *Guil.* 3. 33. *That all the Parties indicted at a General or Quarter-Seſſions of the Peace, proſecuting a* Certiorari, *before the Allowance thereof, ſhall find two ſufficient Manucaptors, who ſhall enter into a Recognizance in the Sum of* 20 *l. before one or more Juſtices of the Peace of the County or Place, (or* [d] *elſe before one of the Judges of the King's Bench, in which Caſe ſuch Judge ſhall make mention of it under his Hand, on the Back of the Writ) and the Recogniſance ſhall be with Condition, at the Return of ſuch Writ, to appear and plead to the Indictment or Preſentment in the Court of King's Bench, and at his own Coſts to procure the Iſſue that ſhall be joined upon the ſaid Indictment or Preſentment, or any Plea relating thereto, to be tried at the next Aſſiſes for the County wherein the Indictment was found, after ſuch* Certiorari *ſhall be returnable, if not in* London, Weſtminſter, *or* Middleſex; *and if there, then to cauſe it to be tried the next Term after wherein ſuch* Certiorari *ſhall be granted, or at the Sitting after the ſaid Term, if the Court of King's Bench ſhall not appoint any other Time for the Trial thereof: And if any other Time ſhall be appointed by the Court, then at ſuch other Time, and to give due Notice of ſuch Trial to the Proſecutor, or his Clerk, in Court; and* [e] *alſo, That the Party or Parties, proſecuting ſuch* Certiorari, *ſhall appear from Day to Day in the ſaid Court of King's Bench, and not depart until he or they ſhall be diſcharged by the ſaid Court: And ſuch Recognizances,* Certiorari's, *and Indictments, ſhall be filed in the King's Bench, and the Name of the Proſecutor (if he be the Party grieved or injured) or ſome Publick Officer, endorſed on the Back of the Indictment; and if the Perſon proſecuting ſuch* Certiorari, *being the Defendant, ſhall not, before Allowance thereof, procure ſuch Manucaptors to be found as aforeſaid, the Juſtices of Peace ſhall, and may proceed to Trial of the Indictment notwithſtanding ſuch* Certiorari.

[d] *Viz. by Force of* 8 & 9 *Guil.* 3. 33.
[e] *Viz. by* 8 & 9 *Guil.* 3. 33.

Sect. 49. And it is farther enacted by the ſaid Statute of 5 & 6 *W.* & *M.* 11. *That if the Defendant proſecuting ſuch* Certiorari, *be convicted, the King's Bench ſhall give reaſonable Coſts to the Proſecutor, if he be the Party grieved or injured, or be a Civil Officer who ſhall proſecute on Account of any Fact that concerned him as Officer to proſecute or preſent; which Coſts ſhall be taxed according to the Courſe of the ſaid Court; and the Proſecutor for the Recovery of*

ſuch

ſuch Coſts, ſhall within ten Days after Demand made of the Defendant, and Refuſal of Payment on Oath, have an Attachment granted againſt the Defendant by the ſaid Court for ſuch his Contempt; and the ſaid Recognizance ſhall not be diſcharged till the Coſts ſo taxed ſhall be paid.

[a] See the fifth Parag.

Sect. 50. And the like in effect is [a] enacted by the ſaid Statute of 5 & 6 *W. & M.* 11. concerning the Removal of Indictments by *Certiorari* within the Counties-Palatine of *Cheſter*, *Lancaſter* and *Durham*.

In the Conſtruction of theſe Statutes, the following Points ſeem moſt remarkable.

Sect. 51. *Firſt*, That notwithſtanding by the expreſs Words, Juſtices of Peace may proceed to Trial of the Indictments, notwithſtanding the *Certiorari*, if a proper Recognizance be not given; yet they will be in Contempt to the Court that awarded the *Certiorari*, if they make no [b] Return to it; for all Writs muſt be obeyed unleſs good Cauſe be ſhewn to the contrary; and the proper way of ſhewing it is to return it.

[b] 1 Keb. 225, pl. 38. 231, pl. 51. 598, pl. 68. 903. pl. 1. 1 Sid. 70.

Sect. 52. *Secondly*, That it appears from the manifeſt Purport of theſe Statutes, That they extend only to *Certiorari's* procured by Perſons indicted; from whence it follows, That thoſe which are procured by the Proſecutor of an Indictment remain as they were at [c] Common Law.

[c] 6 Mod. 246.

Sect. 53. *Thirdly*, That [d] theſe Statutes, being in the Affirmative, as to the taking of Recognizances, do not take away the Power which the Juſtices of the King's Bench have by the Common Law of taking Recognizances upon their granting *Certiorari's*, from whence it follows, That if any ſuch Juſtice, granting a *Certiorari*, ſhall take a Recognizance variant from that preſcribed by the Act, either as to the Sum or Condition, *&c.* Such Recognizance will have the ſame Force as it would have had, if theſe Statutes had not been made; but it is ſaid, That the *Certiorari* if procured by the Defendant, will not in ſuch Caſe be a *Superſedeas* to the Proceedings below, as it would have been at the Common Law; for the Statutes ſeem to be expreſs, That the Seſſions may proceed notwithſtanding any *Certiorari* procured by a Defendant whereon ſuch Recognizance is not given, as is expreſsly preſcribed.

[d] 2 Salk. 564. pl. 3.

Sect. 54. *Fourthly*, That if the Perſons offering to be Sureties, appear to be worth 20 *l.* the Juſtices [e] cannot refuſe them.

[e] March, 27.

Sect. 55. *Fifthly*, That if divers be indicted [f] in the ſame Indictment, and ſome of them find Sureties, and others not, the Indictment ought to be removed as to thoſe who find Sureties (becauſe they ſhall not be prejudiced by the Default of the others.) And, as [g] ſome ſay, It ſhall be removed as to the others alſo.

[f] March, 27.

[g] 1 Keb. 231. pl. 51.

Sect. 56. *Sixthly*, [h] That the Maſter of the Crown-Office, in taxing the Coſts, ought only to conſider thoſe which are ſubſequent to the *Certiorari*.

Vide 6 Ed. 4. 5. a. March, 111. [h] 1 Salk. 55. pl. 5.

Sect. 57. *Seventhly*, That the Proſecutor, by accepting the Coſts ſo taxed, is not reſtrained from aggravating the Fine to be ſet on the Defendant, becauſe he has a Right to ſuch Coſts by the expreſs Words of the Statute; and therefore the Defendant can claim no Indulgence from having paid them: But in other Caſes, after a Proſecutor has accepted Coſts from a Defendant, he cannot by the Rules of the Court, aggravate his Fine; becauſe in ſuch Caſes, having no Right to demand Coſts, if he take them at all, he muſt take them by way of Satisfaction of the Wrong, after which it is unreaſonable in him to harraſs the Defendant. And this I take to be a Common Practice; tho' in [i] *Salkeld's Reports* there ſeem to be a Note to the contrary.

[i] 1 Salk. 55. pl. 5.

Sect.

Sect. 58. *Eighthly,* [a] That notwithſtanding the Condition of the Recognizance ſeem to be expreſs, That the Defendant ſhall procure a Trial at the next Aſſiſes, *&c.* yet it ſhall not be forfeited, unleſs the Proſecutor of the Indictment give Rules according to the Courſe of the Court.

[a] 1 Salk. 370. pl. 4.

Sect. 59. *Ninthly,* That after ſuch [b] Recognizance is forfeited by the Defendant's not procuring a Trial according to the Purport of the Condition, the Court will not hear any Motion to quaſh the Indictment, or *Certiorari.*

[b] 1 Salk. 380. pl. 26. *Dominus Rex verſus* Somers *Mich. 6 Geo.*

Sect. 60. It is enacted by 3 *&* 4 *W. &* M. 10. againſt Deer-ſtealers, *That no* Certiorari *ſhall be allowed to remove any Proceedings on that Act, unleſs the Party convict ſhall become bound, with good Sureties, in* 50*l to pay full Coſts and Damages within one Month after the Conviction ſhall be confirmed, or* a Procedendo *granted.*

Sect. 61. And the like in effect is enacted by 4 *&* 5 *W. &* M. 23. and 5 *Annæ Seſſ.* 2. *Ch.* 14. in Relation to Convictions, on thoſe Acts, of Offences concerning the Game.

Sect. 62. As to the eighth Point, *viz.* How far a *Certiorari* is a *Superſedeas* to the Court below: It is [c] agreed by all the Books, That after it is allowed by ſuch Court, it makes all its ſubſequent Proceedings on the Record that is removed by it, erroneous. Alſo it ſeems to be generally [d] agreed, That a *Certiorari,* for the Removal of an Indictment of Forcible Entry found at a Seſſions of the Peace, being delivered to any one Juſtice of Peace of the ſame Place, before the Statute of 21 *Jac.* 1. ſet forth more at Large *Sect.* 45. which requires, That every ſuch *Certiorari* ſhall be delivered at ſome Quarter-Seſſions in open Court, did (by ſuch Delivery without more) ſo far ſuperſede the Power of the Seſſions, that all its ſubſequent Proceedings thereon, and even an Execution of a prior Award on the ſame Indictment, would have been erroneous. And it ſeems to be generally [e] agreed, That any one ſuch Juſtice, to whom ſuch *Certiorari* ſhould be delivered, might and ought thereupon immediately to have awarded a *Superſedeas* to the Sheriff in order to have ſtopped the Execution of any prior Award of ſuch Court upon ſuch Indictment.

[c] Cro. Ca. 261, 262. 1 Salk. 148, 149.
[d] Cro.El.915, 916. 2 Keb. 305, pl. 5. Moor. 677. pl. 921. 1 Salk. 151. pl. 22.
[e] Cro.El 915, 916. Moore, 677. pl. 921.

Sect. 63. It ſeems to be the better [f] Opinion, That a *Superſedeas* on ſuch a *Certiorari,* being delivered to the Sheriff before he hath begun to put a Proceſs in Execution, will make his ſubſequent Execution of it wholly void; becauſe it is a miniſterial Act, and not a judicial one. But if ſuch *Superſedeas* be not delivered to the Sheriff till after he have in Part executed ſuch Award, it [g] ſeems, That he may afterwards be authoriſed to go through with it by a Writ of *Venditioni exponas,* in the ſame Manner as he may in the like Caſe after a Writ of Error; but I [h] queſtion, Whether he can lawfully proceed after ſuch *Superſedeas* actually delivered to him, without the Writ of *Venditioni exponas?*

This ſeems to be a Quære, F. N. B. 237. Lett. E. Dalt. Ch 134.
[f] Cro. El. 915, 916. Moore, 677, pl 921.
[g] Dy. 98. pl. 57. Yelv. 6. Cro E iz. 597 pl. 2. 1 Rol. Abr. 894. pl. 4. 2 Rol. Abr. 491. D. 5, 6. 3 Keb. 169. pl. 4. 174. pl. 9. 309. pl 51.
[h] *See the Books next above cited,* and Moor, 542. pl. 718. 1 Salk. 147, pl. 12.

Sect. 64. It ſeems to be the ſtronger Opinion, That a *Certiorari,* being once delivered, makes all ſubſequent Proceedings on the Record that ought to be removed by it, [i] erroneous, by Force of thoſe Words, *Coram nobis terminari volumus, & non alibi,* whether ſuch Proceedings are before or after its Return; and notwithſtanding the Party who proſecuted it never make any other Suit to have the Record certified, but only by cauſing the *Certiorari* to be delivered. And in this Reſpect a *Certiorari* hath a ſtronger Force than a Writ of Error; for that becomes [k] of no Effect

[i] Yel. 4. Ch.7. fol. 123. 118. pl. 516 Cont. Crompt. 132. b. 133. a. [k] Dyer 245. pl. 63. 1 Keb. 14. pl. 35. 54. pl. 12. 107. pl 25. 1 Sid. 268. pl. 20. 2 Rol. Abr. 491. pl. 7.

[a] Moore 73. pl. 199. 1 Keb. 93. pl. 79. [b] Dy. 222, 223. Mo. 73. pl. 199 1 Inſt. 128. b. [*] Cro. Jac. 282. pl. 2. Vide ſupra, Ch. 5. S. 7, 8, 9, 10. Cro. El 152. pl. 29. 915, 916. Cro. Jac. 43 pl. 10. Yelv. 32, 57, 121. Cro. Ca. 79. 2 Jon. 209. [c] 1 Salk. 144. pl. 1. 150. pl. 17. [d] 1 Keb. 944. pl. 3. [e] Vide ſupra, Sect. 45 to 62. [||] 2 R. A. 492. Lett F. pl. 12. Dalt. Ch. 75 [f] Cro. Jac. 282. Yelv. 207. 1 Bulſt. 155, 156. [g] 16 Ed. 4. 5. pl. 3. Vide Bro. Diſcontinuance de Proceſs, 52. [h] Raym. 186. 1 Vent. 66. 1 Salk 144, 145. [i] *Agreed by the Court of King's Bench, in the Caſe of the King againſt* Whitlow, Hil. 6. Geo. [k] Lamb. B. 2. Ch. 2 107, 108 [l] Dalt. Ch. 73. and 134. [m] Cro. El. 821. pl. 17. [n] 1 Lev 311. [|||] 2 Salk 479 [o] 1 Rol. Ab. 752. pl. 27. 754. pl. 14. 2 Keb 385. pl. 56. [†] *Cited* 2 Keb. 385. pl. 56. [p] 1 Sid. 64. 1 Lev. 50. 2 Salk. 452 Keb. 941. pl. 62.

if the Party who proſecuted it, neglect to get the Record certified in a reaſonable Time. Alſo it ſeems to be holden in ſome [a] Books, That the very iſſuing of a *Certiorari* is of itſelf a *Superſedeas* to the inferior Court, whether the *Certiorari* be ever delivered or not: In the ſame Manner as an Appearance in the Court above, and a *Superſedeas* purchaſed there, will avoid [b] an Outlawry pronounced after, though ſuch *Superſedeas* were not delivered to the Sheriff before the *quinto exactus*; but the Contrary hereto, in relation to a *Certiorari*, ſeems more agreable to the general Tenor of the [*] Books, and the Reaſon of the Thing. And it hath been [c] adjudged, That if a *Certiorari* for the Removal of an Indictment before Juſtices of Peace be not delivered, before the Jury be ſworn for the Trial of it, the Juſtices may proceed. Alſo it hath been [d] holden, That a *Certiorari* is of no Effect, unleſs it be delivered before its Return is expired. And it is certain that by force of the Statute it cannot at this Time be any [e] *Superſedeas* to the Proceedings on an Indictment at Seſſions, without a proper Recognizance, *&c.*

Sect. 65. It hath been [||] holden, That a *Certiorari* for the Removal of a Recognizance for the Good Behaviour, or for an Appearance at Seſſions, will ſuperſede its Obligation. But this would be highly inconvenient; and the contrary Opinion ſeems to be ſupported by the better [f] Authority.

Sect. 66. It [g] ſeems, That if an Indictment be removed by *Certiorari* after iſſue joined, and afterwards remanded, the Inferior Court ſhall proceed to Trial, in the ſame Manner as it would have done if no *Certiorari* had been granted.

Sect. 67. I ſhall take it for [h] granted, That inferior Courts proceeding after a *Certiorari* delivered, where by Law they ought not, are puniſhable for a Contempt; as hath been more fully ſhewn, *Chap.* 22. *Sect.* 28.

Sect. 68. Alſo it ſeems, That by the Common Law if a *Certiorari* be once filed, the Proceeding below can [i] never be revived by any *Procedendo*.

Sect. 69. As to the ninth Point, *viz.* In what Manner a *Certiorari* is to be returned: I ſhall refer the Reader to the Form in which it is to be done, to [k] *Lambard* and [l] *Dalton*, and ſhall farther take Notice only of theſe following Particulars;

Sect. 70. [*] *Firſt*, That every ſuch Return ought to be under the Seal [m] of the inferior Court, or of the Juſtice, or Juſtices to whom it is directed; and if ſuch Court have no proper Seal, it ſeems, [n] That the Return may be well made under any other.

Sect. 71. *Secondly*, That every ſuch Return muſt be made by the very ſame Perſon to whom the *Certiorari* is directed; for if it be directed to the Juſtices of Peace of ſuch a Place, and the [|||] Clerk of the Peace only return it; or to the Conſtable, or to the Recorder of *B.* and the [o] Deputy Conſtable, or Deputy Recorder, return it, (without ſhewing in the Return that the Principal had Power to make a Deputy); or to the Steward of St. *Paul's*, and the Steward of the Church of St. [†]*Peter* and St. *Paul* return it, nothing is removed. Yet it is [p] certain, That if it be directed to the Juſtice of *Cheſter*, it may be returned by *A. B.* Chief Juſtice; for the ſame Officer is known to be meant, in the Writ and Return, and his Deſcription in both is in Subſtance the ſame. Alſo it is [q] ſaid, That if a Writ of Error be

1 Keb. 165. pl. 120 187 pl. 168. [q] Yelv. 212. Cro. Jac. 254, 255. 1 Sid. 349. 1 Rol. Abr. 753, 754.

directed

directed to ſeveral Juſtices, and returned by Part of them only; yet if it [a] truly recite the Record, it ſo far removes it, that a new Writ of Error lies, *de recordo quod coram nobis reſidet, &c.* And [b] *Quære* how the Court ſhall proceed upon the like Miſ-return of a *Certiorari*?

Sect. 72. *Thirdly*, That [c] regularly a Recognizance taken by a Juſtice of Peace, whether it ſtill actually continue in the Hands of ſuch Juſtice, or [d] have been ſent by him to the Clerk of the Peace, ought to be certified on a *Certiorari* for the Removal of it by ſuch Juſtice only, until it be made a Record of the Seſſions, [e] after which it ſhall be certified in the ſame Manner as the other Records thereof ſhall be.

Sect. 73. *Fourthly*, That it is [f] adviſeable, That a Return to a *Certiorari* directed to Juſtices of Peace, for the Removal of an Indictment taken before them, have the Clauſe *Necnon ad diverſas Felonias, &c.* as well in the [g] Deſcription of the Juſtices who make the Certificate, as of thoſe before whom the Indictment is ſaid to be taken in the Caption; which Matter hath been already conſidered, *Chap.* 8. *Sect.* 33. and *Chap.* 25. *Sect.* 123, 124, 125.

Sect. 74. *Fifthly*, [h] That the Perſon to whom a *Certiorari* is directed, may make what Return to it he pleaſes; and the Court will not ſtop the filing of it on Affidavits of its Falſity, except only where the Publick Good requires it, (as in the Caſe of the [i] Commiſſioners of Sewers) or for ſome other ſpecial Reaſon: But regularly the [k] only Remedy againſt ſuch a Falſe Return, is an Action on the Caſe at the Suit of the Party injured by it, and an Information, *&c.* at the Suit of the King.

Sect. 75. *Sixthly*, [l] That whatſoever Matters are put into the Return of a *Certiorari*, by way of Explanation or otherwiſe, beſides thoſe which are expreſsly ordered to be certified, are put in without any Warrant or Authority, and conſequently ſhall be no more regarded by the Court above, than if they had been wholly omitted.

Sect. 76. *Seventhly*, That [m] generally the Return to a *Certiorari* ought to certify the Record itſelf, or the Tenour of it, or the [n] Tenour of the Tenour, [o] according as the Writ requires: And agreeably hereto it hath been [p] adjudged, That if on a *Certiorari* to return an Order of Juſtices of Peace, the Tenour of ſuch Order be certified, the Return is naught; yet a Return of the Tenour of an Indictment from *London* on a *Certiorari* to remove the Indictment itſelf, is good by the City-Charter, as hath been already ſhewn, *Sect.* 26. Alſo, it [q] ſeems to have been generally holden, That where-ever the Purport of a *Certiorari* is not to proceed upon the Record to be removed, but only to try an Iſſue of *Nul tiel Record*, it is ſufficient to certify the Tenour of the Record, whether the *Certiorari* require a Certificate of the Record itſelf, or of the Tenour of it only. However, I take it to be clear, That if the Court which awards ſuch a *Certiorari*, have no Juriſdiction to proceed on the Record thereby ordered to be removed; as where the Court of [r] Common Pleas award a *Certiorari* for the Removal of an Indictment on the Iſſue of *Nul tiel Record*, concerning ſuch Indictment, the Court below ought only to certify the Tenour of it, leſt there ſhould be a Failure of Juſtice.

Sect. 77. As to the tenth Point, *viz.* Where a Record is removed by a *Certiorari*: Having premiſed that nothing can be removed by it where it is improperly [s] directed, or [t] returned, for which I ſhall refer the Reader to the foregoing Parts of this Chapter; I ſhall in this Place obſerve only the following Particulars;

[a] Vide Yelv. 6, 7. 28 H. 6. 12. pl. 24. 1 Rol. Abr. 753 Lett. Q. 754.
[b] Vide F. N. B. 71. Letter d.
[c] 21 H. 7. 21 pl. 4. Cro Jac. 669. 2 H. 7. 1. pl. 2.
Supra Sect. 43.
[d] Domina Regina *verſus* Randal, Peſc. 13 Annæ.
[e] Vide ſupra Sect. 43. Regiſter Origin, 90, 151, b. 283, b. 284, &c. F. N. B. 81. Letter c. 2 H. 7. pl. 2. Bro. Peace, 11. Dalt. Ch. 70.
[f] Crompton, 131, b. 132 a. Lamb. B. 4. Ch. 7. fol. 516, 517. Dalt. Ch. 134.
[g] 22 Ed. 4. 12, b. 13. a. 12 H. 7. 25. pl. 3. 2 R. 3. 9. pl. 20. Bro. Indictment, 32, 50. Cauſe a Remover Plea, 27. Vide 1 Keb. 263. pl. 48.
[h] 6 Mod. 90. Domina Regina *verſus* Norton, Paſ. 11 Annæ.
[i] Supra Sect. 34.
[k] 6 Mod. 90. 2 Salk. 492, 493.
[l] Regiſter Origin, 151, a. 169 a. b. F. N. B. 245. Letter B.
[m] F. N. B. 245. Lett. B. 3 Keb. 13. pl. 17.
[n] F. N. B. 245. Lett. B.

Crompt. 131. b. Dalt. Ch. 134. Lamb. B. 4. Ch 7. f. 515. [p] 1 Salk. 147 pl. 10. 2 Salk. 492, Keb. 13. pl. 17. Dyer 187. pl. 4. 1 Keb 107. pl. 127. [r] 1 Rol. Ab 394. pl. 2. 395 pl. 1, 2. Vide Supra Sect 41 42, 43. [t] Vide Supra Sect 69, *&c.* 493. [q] 3 Hob. 135.

Sect.

Sect. 78. *First*, That it ſeems to be ſettled at this Day, That as [a] Writ of [a] Error may remove a Judgment given; and a [b] *Recordare* may remove a Plaint entred, after its *Teſte* and before its Return: So likewiſe a [c] *Certiorari* may remove a Record that ſhall come within its Deſcription before the Time of its Return, tho' there were no ſuch Record *in eſſe* at the Time of its *Teſte*, [d] nor at the Time when it was firſt delivered to the Court below.

Sect. 79. *Secondly*, That as a *Recordare* will remove a Plaint that was [e] diſcontinued below, becauſe the Court above will proceed only on the Plaint, and all the other Proceedings thereon below are to no Purpoſe; there ſeems to be the like Reaſon that a *Certiorari* alſo may remove an Indictment which was diſcontinued below.

Sect. 80. *Thirdly*, That as a Writ of Error can remove no Record which materially varies from the Deſcription ſet forth in ſuch Writ, ſo neither can a *Certiorari*, as in the following Inſtances;

Sect. 81. *First*, Where the Writ deſcribes an Indictment or other Record, taken before *A. B.* and eight others, and that certified appears to have been taken before [f] *A. B.* and ſeven others only, or [g] before him and the other eight mentioned, and others alſo beſides them; or where the Writ deſcribes a Record, [h] *coram A. & B. & ſociis ſuis*, and the Record certified appears to have been taken *coram C. D. & ſociis ſuis*; or [i] where the Writ calls the Juſtices, before whom the Record is taken, *Juſticiarios noſtros*, and in the Record certified they appear to have taken it as Juſtices of a former King.

Sect. 82. *Secondly*, Where the Writ deſcribes an Indictment for ſtealing [k] two Horſes, and that certified is for ſtealing one Horſe only.

Sect. 83. *Thirdly*, [l] Where the Writ deſcribes an Order concerning Foreign Salt, and that certified is concerning Salt in general.

Sect. 84. *Fourthly*, [m] Where the Writ deſcribes on Order concerning the Town of *Needham-Market*, or concerning the Manor of [n] *Anſly*, and an Order concerning the Town of *Needham*, or the Manor of *Aneſly*, is returned, without ſhewing in the Return that they are both the ſame Town.

Sect. 85. *Fifthly*, Where the Writ mentions only [o] Orders againſt *A. B. & C.* or Indictments wherein *A. B. & C.* are indicted, and thoſe certified are againſt *A.* only, or againſt *A. & B.* only. Yet [p] it is taken for granted in many Books, neither do I find it any where denied, That a *Certiorari* for the Removal of all Indictments againſt *A.* may remove one wherein the ſaid *A.* is indicted, together with twenty others, ſo far as it concerns him; becauſe in Judgment of Law it is a ſeveral Indictment as to every one of the Perſons indicted. But I do not find it [q] agreed, Whether in ſuch a Caſe the Indictment ſhall be removed ſo far as it concerns the other twenty?

Sect. 86. *Sixthly*, Where there is a [r] material Variance between the Writ, and the Record certified, in the Names or Additions of the Parties; as where the Writ gives the Defendant the Surname of [s] *Giggurt*, and the Record certified that of *Giggeer*; or where the Writ commands the Removal of all Convictions againſt [t] *Henry*, Coachman, *quocunque no-*

[a] 1 R. 3. 4. pl. 8. Bro. Recordare, 9. 1 Mod. 112. 3 Keb. 308. pl. 51. Cont. Noy, 54. 1 Rol. Abr. 749. M. 1.
[b] 1 R. 3. 4. pl. 8. Bro. Recordare, 9.
[c] 1 R. 3. 4. pl. 8. Dy. 222. pl. 23. 1 Vent. 63. Bro. Recor. 9 1 Mod. 41. 1 Salk. 149. pl. 3. Lamb. B 4. Ch. 7. fol. 517. Crompt. 132. b. Dalt. Ch. 134 1 Mod. 112. Yelv. 32. Cont 1 Sid. 317. 2 Keb. 141. pl. 13. 142. pl. 15. Noy 54. 1 Rol. Abr. 749. M. 1.
[d] 1 Rol. Abr. 395 B 1.
[e] 3 H 6. 30. pl. 17. F. N. B. 71. Lett. A. Fitz. Recordare, 2
[f] Cro. Jac. 254, 255. Yelv. 42. Plow. Com. 392.
[g] Vide Bro. Error, 13. 28 H 6. 11 pl 24. 1 Keb. 129. pl. 51. 282. pl 86. 102. pl. 106.
[h] 1 Sid. 448. *Parallel Caſe*, 1 Rol. Abr. 753 pl. 14 1 Rol. Abr. 753. pl. 3.
[i] 1 Roll Abr. 754. pl. 7, 13. Dyer 105 pl. 6. Yelv. 212.
[k] 2 Aſſ pl. 3. S. P. C. 70. Lett. C. Bro. Varriance, 62. Lamb. B. 4. Ch. 7. fol. 518. Bro. Coro. 69. Crompt. 132. b. 1 Bulſt. 155.
[l] 1 Salk. 145. pl. 4.
[m] 2 Salk. 452. See Cro. El. 882. pl. 14.
[n] 12 Aſſ pl. 2. Bro. Variance, 66.
[o] 1 Salk. 146. pl. 9. 151. pl. 21. Domina Regina, *v.* Horſpurt, Hill. 12 Annæ Cont. 1 Rol. A 395. B. 2.
[p] 6 Ed. 4 5 pl. 13. Record Bro. 57. Lamb. B 4. Ch. 7 f. 517. Crompt. 132. a. Dalt. Ch. 134. March, 112.
[q] *Affirmed* 6 Ed. 4. 5. pl. 13. Record Bro. 57. Lamb. B. 4. Ch. 7. f. 517. Crompt. 132. a. Dalt. Ch. 134. *Denied*, March, 112. 1 Keb. 231. pl. 51.
[r] Vide 1 Rol. Abr. 754. pl. 5, 6.
[s] Salk. 264 pl. 8.
[t] *Adjudged Mich. tertio Georgii.*

mine cenſeatur, and thoſe certified are againſt *Henry Munton*, Coachman; or where the Writ calls the Defendant *John* [a] *of Stiles*, and the Record *John Stiles*; or where the one calls him [b] Knight and Baronet, and the other Baronet only; or the one [c] *Garret Maines*, and the other *Gerard Malines*; or the one *J. S.* [d] *nuper de B.* and the other *J. S. nuper de C.* or the one *J. S.* of *B.* * *Sadler*, and the other *J. S.* of *B. Salter*. Yet if the Variance be only in the Spelling, and the Words have the very ſame Sound either way, as [e] *Bird* and *Burd*, [f] *Shelbury* and *Shelbery*, it ſeems that it will not be material; becauſe it appears not by any Record of the Court, but that the Name in the *Certiorari* may be the true Name, and the Record certified deſcribing one by a Name of the ſame Sound, ſhall be intended to mean the ſame Perſon. Alſo, if a *Certiorari* name the Party without any Addition, and the Record certified, name him with an Addition; yet it ſeems that it may be probably argued, that the Record may be well removed by ſuch Writ, in the ſame Manner as it may be by a Writ of [g] Error, which has the like Variance. But if a Writ of Error deſcribe a Perſon with an Addition, which is omitted in the Record certified, it hath been [h] lately adjudged contrary to the Opinion in Sir *Edward Coke*'s [i] Third Report to the contrary (which ſeems to be rather contradicted than ſupported by the [k] Authorities cited to maintain it) that it cannot remove the Record; and the Reaſon ſeems to be the ſame in Reſpect of a *Certiorari*.

Sect. 87. As to the eleventh Point, *viz.* What is to be done by the Court above, where the Record mentioned in a *Certiorari* is not removed by it: It is [m] ſaid, That ſuch Court cannot in ſuch Caſe proceed upon the Record; becauſe in Judgment of Law it ſtill remains in the Court below, but will either [n] quaſh the Writ, and [o] award a new one, or ſuffer the Court below to proceed in the Cauſe, and take ſuch [p] Order in Relation to the Defendant's Appearance either in the one Court, or the other, to anſwer the farther Proſecution of the Cauſe againſt him, as ſhall in Diſcretion appear to be moſt proper.

Sect. 88. And now I ſhall conſider the ſixth Particular, *viz.* What Proceſs is to be awarded after the Removal of a Record by *Certiorari* into a ſuperior Court: As to which I take it to be agreed, That, after ſuch Removal, if the Defendant do not appear in the Court of King's Bench, the ſame [q] Kind of Proceſs lies againſt him as if the Cauſe had been originally commenced there. Alſo I take it to be [r] agreed, That ſeeing by ſuch Removal the Cauſe below is wholly put without Day, there is no Way to nonſuit the Plaintiff, before he hath appeared in the Court of King's Bench, but by taking out a *Scire facias* to warn him to proſecute his Appeal in that Court; whereupon if the Sheriff return a *Scire feci*, he ſhall be nonſuit. And if the Sheriff return a *Nihil*, a *Scire facias ſicut alias* ſhall be awarded; whereon, if the Sheriff return a ſecond *Nihil*, I do not find it [s] agreed what ought farther to be done.

Sect. 89. As to the ſeventh Particular, *viz.* Where the Proceſs on an Appeal, Indictment, or Information ſhall be ſaid to be diſcontinued, or miſcontinued, or put without Day; having premiſed, that it ſeems

[a] 26 Aſſ. pl. 31.
[b] Cro. Ja 633.
[c] Vide Cro. Ja. 477.
[d] *Adjudged in a Writ of Error between* Ainſworth *and* Wilſon. Hil. 5 Geo. Par. Caſe, 1 Sid. 193 pl. 23.
* Dy. 173. pl. 16.
[e] 1 Rol. Abr. 753. pl. 4. Cro. El. 172. pl. 14. Cont. 25 Ed. 3. 43. pl. 3.
[f] Vide Cro. El. 172. pl. 14.
[g] 1 Rol. Abr. 797. Lett. H. 2 Rol. Ab. 329, pl. 14. 1 Sid. 193. pl. 23. 9 H. 6. 1. pl. 3. Dyer 25. pl. 161.
[h] Shute *and* Car, *adjudged Hill. Tertio Georgii.*
[i] 9 H. 6. 1. pl. 13. Bro. Variance. 6. Vide Dy. 25. pl. 161. Cont. 1 Sid. 104. 2 Rol. Abr. 328, 329.
[k] 3 Co. 2. a. 1 Rol. Abr. 752. a. 9 H. 6. 1. 7 Aſſ. pl. 5. 26 Aſſ. pl. 31.
[m] 12 H. 7. 25. pl. 3. 2 R. 3. 9. pl. 20. 3 Aſſ. pl. 3. Vide 1 Sid. 193. pl 23. 2 Keb. 142. pl. 15. [n] 1 Keb. 102. pl. 106. 1 Salk. 147. pl. 10. [o] Vide 3 Aſſ. pl. 3. [p] Vide 12 H. 7. 25. pl. 3. 3 Aſſ pl. 3. 2 R. 3. 9. pl. 20. Bro. Indictment, 50. Bro. Coro. 69. 2 Keb. 142. pl. 15. Lamb. B. 4. Ch. 7. f. 518. Supra, Ch. 25. Sect 11. [q] S. P. C. 70. Lett. D. E. H. P. C. 211. [r] S. P. C. 70. Lett. D. H. P. C. 211. 48 Ed. 3. 22. pl. 2. 48 Aſſ. pl. 3. 1 Salk. 61, 62. 6 Mod. 246. Bro. Appeal, 15, 140. Fitz. Coro. 105. [s] Vide S. P. C. 70. Lett. D. E. 72. Lett. A. 48 Ed. 3. 22. pl. 2. 48 Aſſ. pl. 3. Bro. Appeal, 15, 140. Fitz. Coro. 105.

to be agreed, That every Suit, whether Civil or Criminal, and alſo every Proceſs in ſuch Suit againſt Jurors, ought to be properly continued from Day to Day, from its Commencement to its Concluſion, without any the leaſt Gap or Chaſm; and that the ſuffering any ſuch Gap or Chaſm, is properly [a] called a Diſcontinuance; and the continuing of the Suit by [b] improper Proceſs, (as by a *Capias* inſtead of a *Diſtringas*) or by giving the Parties an [c] illegal Day, is properly called a Miſcontinuance: I ſhall for the more diſtinct underſtanding of the Learning of this Kind, endeavour more particularly to ſhew;

First, In what particular Inſtances Proceſs is generally ſaid to be diſcontinued.

Secondly, Where to be miſcontinued.

Thirdly, Where to be put without Day.

And firſt, Proceſs is generally ſaid to be diſcontinued in the following Inſtances,

Sect. 90. *First*, Where the ſecond is not teſted on the very ſame [d] Day on which the firſt is returnable; as where a *Venire facias* is returnable on the 23 of *January*, and the *Diſtringas* is teſted on the 24th, or any other ſubſequent Day.

Sect. 91. *Secondly*, Where there is a Term intervening between the *Teſte* and Return of a [e] *Capias*; for the Law will not ſuffer any ſuch *Capias*, leſt thereby the Defendant ſhould be impriſoned an unreaſonable Time; but an Original may be continued by any [f] other Proceſs, except a *Capias*, tho' it have a Term or more intervening between its *Teſte* and Return. [g] Neither is it any Objection to an Exigent, That it is not made returnable on the next Term after its *Teſte*, becauſe it muſt allow Time enough for five Counties to be holden between its *Teſte* and Return.

Sect. 92. *Thirdly*, [h] Where, after Iſſue or Demurrer, the Court give the Parties a Day to a diſtant Term, without making any Continuance to that immediately following.

Sect. 93. *Fourthly*, Where the Term to which the Suit is continued is adjourned, and the Suit is [i] not adjourned accordingly.

Sect. 94. *Fifthly*, Where any of the Parties are deſcribed in any Continuance of the Suit, whether on the [k] Roll, or by [l] Proceſs, by a Name or Addition variant from thoſe in the Original, *&c.* tho' [m] only in one Letter.

Sect. 95. *Sixthly*, Where after Iſſue joined the Proceſs is [n] not continued from Time to Time againſt the Jurors, returnable on the ſame Days to which the Suit is continued on the Roll againſt the Parties.

Sect. 96. *Seventhly*, Where [o] a joint *Venire* is firſt awarded for the Trial of all the Defendants together, and afterwards ſeveral *Venires* for the Trial of each of them.

Sect. 97. *Eighthly*, Where [p] a *Venire* omits Part of the Iſſue, or Iſſues to be tried.

[a] Fitz. Judgment 12. Finch of Law 431. Co. Litt. 325, a. Bro. Amend. 17. Fitz. Proceſs, 124. 127. 1 H. 7. 2. b. 22 E. 3. 2. pl. 12. 22 E. 4. 3. pl. 12. 12 H. 4. 3. pl. 5.

[b] 21 H. 7. 16. pl. 27. 8 H. 6. 29. pl. 24. 12 H. 4. 3. pl. 5. 10 H. 7. 21. pl. 15. Keilw. 36. Finch of Law 431, 432. Co. Litt. 325. Bro. Diſcontinuance de Proceſs, 11. 23, 50, 57, 61. 12 H. 4. 18. pl. 15. Cont. 40 E. 3. 16. pl. 5. Fitz. Amend. 12.

[c] Bro. Diſcontinuance de Proceſs, 23. 21 H. 7. 16. pl. 27.

[d] 1 Bulſt. 141, 142, 143. Yelv. 204, 205. Cro. Ja. 283, 284. 6 Mod 281, 282, 283. 1 Salk. 51.

[e] 8 Ed. 4. 13. pl. 10. Dy. 175, pl. 23. Cro. El. 467. *the firſt.* Fitz. Continuance, 3.

[f] 8 Ed. 4. 13. pl. 10. Daliſ. 108. Dyer 175. pl. 23. *Quære* Bro. Diſcontinuance de Proceſs, 23. 21 H. 7. 16 pl. 27. [g] Daliſ. 108. 1 Rol. Abr. 484. pl. 1, 3. [h] Cro. Ja. 236. Yelv. 169. 21 H. 7. 16. pl. 27. 1 Rol. Abr. 484. pl. 8, 9, 10. Cont. 1 Bulſt. 144. 3 Bulſt. 233. [i] Vide 1 Danv. Abr. 243. 4 E. 4. 40. Fitz. Diſcontinuance, 27. [k] Fitz. Diſcontinuance, 1. Bro. Amendm. 22. 4 H. 6. 6. pl. 17. 40 E. 3. 18. pl. 10. [l] Fitz. Amendm. 13, 17, 21, 27, 69, 77. Diſcontinuance, 7, 12, 17, 40, 42. Error, 15. Bro. Diſcontinuance de Proceſs, 46. Amendm. 50. 38 E. 3. 22. b. 39 E. 3. 21. a. 40 E. 3. 31. pl. 9. 34. pl. 18. 8 H. 5. 2. pl. 9. 7 H. 6. 27. pl. 20. 9 H. 6. 39. a. [m] *Quære* 4 H. 6. 6. b. Bro. Amendm. 45. Fitz. Amendm. 21. [n] 21 Ed. 4. 20. pl. 27. Bro. Diſcontinuance de Proceſs, 53. Continuance, 82. [o] *Quære*, 22 H. 6. 3. b. 4. a. Fitz Diſcontinuance, 11. Vide 7 H. 6. 27. pl. 19. [p] Fitz Diſcontinuance 14, 35. 2 H. 5. 3. pl. 16 Vide Bro. Diſcontinuance de Proceſs, 63. *Quære* Cro. El. 622. pl. 14.

Sect. 98. *Ninthly*, † Where a *Venire* omits any of the Parties.

Sect. 99. *Tenthly*, Where a Juror is named in the *Habeas Corpora*, by a Name [a] different from that in the Panel returned on the *Venire*; or where a Juror returned on ſuch a Panel is wholly omitted in the *Habeas Corpora*; but in theſe Caſes, if the Juror ſo miſnamed, or *omitted, be not ſworn at the Trial of the Cauſe, it is [b] queſtionable, Whether there be any Diſcontinuance at all?

Sect. 100. *Eleventhly*, Where a *Venire* or *Diſtringas* are iſſued without any [c] Award on the Roll to warrant them.

Sect. 101. It [d] ſeems, That before the making of the Statutes of 11 *H.* 6. 6. and 1 *E.* 6. 7. all Pleas and Proceſſes before Juſtices of Aſſiſe, Gaol-Delivery, *Oyer* and *Terminer*, or *Peace*, or other the King's Commiſſioners, were diſcontinued by the making a new Commiſſion, or Aſſociation, or by altering the Names of the Juſtices or Commiſſioners; but this Miſchief is fully remedied by thoſe Statutes.

Sect. 102. If an [f] Indictment be removed by *Certiorari*, after Iſſue joined, and Proceſs awarded for the Trial; *Quære*, If it ſhall be diſcontinued, if not remanded before the Return of ſuch Proceſs?

Sect. 103. As to the ſecond Point, *viz.* Where Proceſs is generally ſaid to be miſcontinued: It ſeems, That where-ever an Error in Proceſs doth not amount to a Diſcontinuance, it is generally called a Miſcontinuance; and this ſeems agreeable to the proper Notion of the Word; for as a Cauſe may then properly be ſaid to be diſcontinued, when there is either nothing at all done to continue it, or nothing but what is as to this Purpoſe merely void in Law; ſo it ſeems to be properly ſaid to be miſcontinued, where it is continued amiſs, or by an [g] erroneous and not void Continuance. And agreeably hereto, the Books which ſpeak of Errors in Proceſs, ſeem generally to include them all, without [h] Exception, under the general Heads of Miſcontinuance and Diſcontinuance. And this, as I apprehend, was alſo the Opinion of the greater Part of the Court of King's Bench, in the late Caſe of [i] *Widdrington* and *Charleton*.

Sect. 104. As to the third Particular, *viz.* Where Proceſs ſhall be ſaid to be put without Day: It ſeems [k] agreed, That by the Common Law all Proceedings upon any Indictment, Information, or Popular Action, whereon no Judgment had been given, were wholly determined by the Demiſe of the King, and that nothing remained but the Indictment or Information, Original Writ, or Bill, which were put without Day till re-continued by Re-attachment to bring in the Defendants to plead *de novo*. But this is fully [l] provided for by 4 & 5 *W.* 3. 18. and 1 *Annæ* 8. By which it is enacted, That ſuch Proceſs, *&c.* ſhall continue in the ſame Force after the King's Demiſe, as it would have had if he had lived.

Sect. 105. As for Appeals, [m] I do not find it any where ſaid, That the Pleas, and other Proceedings therein, being put without Day by the Demiſe of the King might not be revived by a ſpecial Re-attachment, in the ſame Manner as in any other Action: However it is certain at this Day, That by Force of 1 *Ed.* 6. 7. and 1 *Annæ* 8. neither the Writ nor Bill, nor any Plea, nor Proceeding therein, ſhall be any way diſcontinued or put without Day by ſuch Demiſe.

† Fitz Diſcontinuance, 10, 35. 1 Rol. Re. 22. pl. 30. 3 Bulſt. 311. Winch, 73. Br. Amendm. 50. 39 E. 3. 21. a.

[a] Fitz Repleader, 4. Amendm. 26. 4 H. 6, 7, 8. pl. 20. 19 H. 6. 39. a. 9 Ed. 4. 13. pl. 7. 27 H. 6. 5. pl. 33. Bro. Diſcontinuance, 47. Vide 1 Danv. Ab. 330, 331. 5 Co. 42. a. b.

* Fitz. Amendm. 57. 37 H. 6. 12. a. b. Br. Amendm. 51.

[b] 1 Sid. 66. 1 Keb. 182, 191, 198, 215. 6 Mod. 285. Fitz. Diſcontinuance, 4. *ſeem to make it no Diſcontinuance.* But 19 H. 6. 39. a. 34 H. 6. 20. pl. 39. 27 H. 6. 5. pl. 33. Fitz. Enqueſt, 18. 5 Co. 36. b. 37 a. Fitz. Diſc. 37, 38. Br. Amendm. 10, 37, 92. *are to the contrary.* Vide Cro. E. 586 pl. 17.

[c] Fitz. Error, 16. 7 H. 6. 28.

[d] Vide ſupra, Ch. 5. Sect. 5, 6, 7, 8, 9, 10, 11, 12. Ra. Ent. 77. pl. 2, 3.

[f] Vide Bro. Diſcontinuance de Proceſs, 52. 15 Ed. 4, 5. pl. 3. Supra. Sect. 66. [g] Vide Finch of Law, 431. 21 H. 7. 16. pl. 27. 39 E. 3. 20. b. [h] 21 H. 7. 16. pl. 27. Bro. Diſcontinuance de Proceſs, Amendment, 17. Cro. Jac. 283, 284. [i] Bulſt. 142, 143. [k] Trin. 11 Annæ. [k] 7 Co. Jac. 14. Moore 748. [l] Vide Supra, Ch. 1. Sect. 12, 13. [m] Vide 7 Co. 30. Sup. Sect. 89. 11, 47, 50, 57. 30, 31. Cro.

Sect.

Sect. 106. It ſeems to be holden by [a] ſome, That all Cauſes whether Civil or Criminal, are diſcontinued; and by [b] others, who ſeem to ſpeak more accurately, That they are put without Day, by the Juſtices before whom they were depending, not coming on the Day to which they are continued, whether ſuch Abſence were occaſioned by [c] Death, or any other Cauſe. But it ſeems to be agreed by all, That a Cauſe ſo diſcontinued, or put without Day, cannot be revived without a Re-ſummons, or Re-attachment; which if they are [d] Special, may revive the whole Proceedings; but if general, the original Record only. Nor do I find that any Statute hath remedied this Miſchief, except in the Caſe of Aſſiſes, and *Juris utrum*, which are provided for by 1 *E.* 6, 7.

Sect. 107. As to the eighth Particular, *viz.* How far Errors in Proceſs are fatal: It ſeems to be generally taken [e] as an undoubted Principle, That a Diſcontinuance, by ſuffering a total Chaſm in the Proceedings, whether on the Roll or in the Proceſs, by not giving a freſh Continuance *inſtanter* upon the Determination of the precedent, ſhall never be aided by an Appearance and pleading over: And the Book [f] of 9 *H.* 5. 2. pl. 7. ſeems to have an Opinion, That the Miſreturn of a Sheriff, as where he returns a *Cepi* on the Award of an Exigent, is not ſaved by the Defendant's pleading over; but this is [g] queſtioned by *Staundforde*, and ſeems contrary to the general Tenour of the other [h] Books, and contradicted both by [i] *Brook* and [k] *Fitzherbert*, in their Abridgment of this very Caſe. And in all probability the Book is miſ-printed; for as it ſtands at preſent, it is hardly Senſe, or reconcileable with [l] itſelf. But if a Defendant appearing on erroneous Proceſs, expreſly except to it before he have pleaded over, there have been many [m] Authorities, that he ought to be diſcharged, and that [n] new Proceſs ſhall iſſue where the Defect firſt happened. But there is a greater [o] Number of Authorities to the contrary; by which it appears, That if the Original be good, and the Defendant preſent in Court, he ſhall be compelled to anſwer it, let the Proceſs whereon he came in, or the Execution of it, be never ſo erroneous, or defective, ſo that it never were diſcontinued; for the End of Proceſs is to compel an Appearance; and that End being ſerved, and a legal Charge appearing againſt the Defendant no way diſcontinued, the Law will not ſo far Regard a Slip in the Proceſs, as to let the Defendant out of Court in order only to have him brought in again in better Form. And therfore where a Defendant hath excepted to the Proceſs whereon he hath appeared, that he was [p] never ſerved with it, or that [q] no ſuch Proceſs lies in the Caſe, or that it bore [r] *Teſte* before the Original, or that it

[a] Dy. 226, pl. 38. Keil. 2. pl. 3. Cro. E. 12. pl. 1. Bro. Diſcontinuance de Proceſs, 29. 25 Aſſ pl. 5. Vide 1 Co. 38.

[b] Co. Litt. 135. b. Finch of Law 432 433. Ra. Ent. 77. pl. 1. Fitz. Diſcontinuance, 19 Re-attachment, 1, 17, 23, 24. 9 H. 6. 40 a. 24 E. 3. 23. pl. 17. 28 Aſſ pl. 42. 30 Aſſ pl. 39. Bro. Diſcontinuance de Proceſs, 2.

[c] Vide Bro. Re-attachment, 18. 4 H. 7. 7. pl. 6. F. N. B. 111. d. 187, b. 188. a.

[d] 7 Co. 29. b. Fitz. Re-attachment, 1.

[e] 1 Bulſt. 143. Yelv. 204. Cro. Ja. 283, 284. 8 H. 6. 29. pl. 24. 21 H. 6. 16. pl. 27. 12 H. 4. 17. pl. 15. 34 H. 6. 20. pl. 39. 18 H. 6. 15. a. b. Co. Litt. 325. a. Bro. Diſcontinuance de Proceſs, 4, 11, 47. Amendment, 17. Fitz. Proceſs 127. Diſcontinuance, 40. Amendment, 27. 38 E. 3. 22. b. 19 H. 6. 39. a *See* Bro. Error, 3. Repleader 2. and Diſc. 1. *Where the contrary Opinion is ſaid to have been holden; but this ſeems not to be warranted by the Caſe at Large in the Year-Book.*

[f] Vide Supra, Ch. 23. S. 141.

[g] S. P. C. 169. b.

[h] 5 Co. 45. a. Fitz. Coro. 444. Co. Litt. 325. a. Salk. 59. pl. 2. 1 Sid. 260. pl. 7. 1 Rol. Ab. 779. Letter L. 780. Yelv. 158. Cro. El. 582. pl. 6. Cro. Jac. 311. pl. 10. *See the Books cited to the other Parts of this Section. In* 1 Rol. Ab. 380. pl. 6. *Notice is taken of three Reſolutions that a* Copias *where it lies not, is not aided by an Appearance and pleading over, and of a ſubſequent one contradicting them.*

[i] Bro Reſtitution. 8.

[k] Fitz. Coro 68. *But in another Part of his Book he abridges this Caſe, without taking any Exception to it.* Fitz Damage, 50.

[l] *Alſo it is cited in* Yelv. 204. Cro. Jac. 284. 1 Bulſt. 142. *for the Proof of the contrary Opinion.*

[m] 40 E. 31. pl. 10. 47 Ed. 3. 14. pl. 16. 18 H. 6. 15. a. b. 3 H. 6. 9. a. Fitz. Repleader, 1. Amendm. 14. Proceſs. 154. Error, 82. Bro Diſcontinuance de Proceſs, 50, 57. Default and Appearance, 11. 1 Rol. Abr. 779. L. 3. 3 Mod. 265. *But the Year-Book of* 8 H. 6. 29. b. *from which the above-cited Authority in* Brook Diſcontinuance, 50. *is taken, ſeems rather to contradict than warrant it.*

[n] 8 H. 6. 29 pl. 24. 12 H. 6. 18. pl. 15. 18 H. 6. 15. b. 47 E. 3, 14. pl. 16. Bro. Diſcontinuance de Proceſs, 11, 50, 57. Fitz. Proceſs, 127. Diſcontinuance, 17.

[o] 21 H 7. 16. pl. 27. Fitz. Error, 47. 46 E. 3. 30. pl. 28. Bro. Error, 28. Reſponder, 12. Faux Judgment, 4. 10 H. 7. 21. pl. 15. Yelv. 158. 1 Sid. 100 pl. 10. 260. pl. 7. *and ſee the other Books under-cited.*

[p] Fitz. Diſcontinuance, 36. 9 H. 5. 3. pl 8. 1 Rol. Ab. 779. L. 1, 2. 46 E 3. 30. pl. 28. Bro. Faux Judgment, 4.

[q] 10 H. 7. 21. pl. 15. 12 H. 4. 18. pl. 15. Bro. Error 109. Proceſs 173. Jour. 36, 54. 21 H. 7. 16. pl. 27. 8 H. 6. 29. pl. 24. Fitz. Proceſs, 127.

[r] 2 Sid. 406. pl. 16.

was not awarded into the * proper County, or that it was † not returnable at a proper Day, or that it was ‖ directed to one who was no Officer, or that it had not ſo many Days as it ought ¶ between its *Teſte* and Return, or for any ** other ſuch like Defect; yet he hath been compelled to anſwer the Original. And agreeably hereto it was lately [a] resolved, upon great Deliberation by the Court of King's Bench, againſt the Opinion of Mr. Juſtice *Powell*, That the Defendant in an Appeal of Death, coming in upon an Exigent, which was erroneous for want of the Words *de morte viri, &c.* had ſalved the Error by his Appearance, notwithſtanding he had done all he could to take Advantage of it, by craving *Oyer* of the Proceſs, and then demurring. And [b] *Note*, That in all the *Year-Books* above-cited to this Point, except ** one, it is ſaid generally, That ſuch Errors are ſalved by an Appearance, without any mention of any Amendment: But in that one it is ſaid, That they ſhall be amended. Alſo it ſeems, That where-ever Proceſs is awarded [c] *inſtanter* from Time to Time, without any the leaſt Break or Chaſm, and the Parties have [d] always a Day upon the Roll, all other Kinds of Errors whatſoever that come under the Name of Diſcontinuances, are [e] ſalved by an Appearance; for there are [f] Caſes by which it appears, That Defendants appearing, and taking Exceptions to ſuch Errors, have been compelled to anſwer to the Original, which they wou'd not have been if ſuch Original had been taken to have been diſcontinued by ſuch Errors, as they certainly are by an Error, in ſuffering a total Chaſm in the Continuance. And if the Original be not diſcontinued by ſuch Errors, Why ſhould they not be as much ſalved by an Appearance, as any of the other Errors above-mentioned? For would it not be altogether as trifling in this, as in any other Caſe, to diſmiſs a Perſon only in order to ſend for him again? And in Criminal Caſes this cou'd not but be of the utmoſt ill Conſequence, by giving the Defendant, who is actually in the Power of the Court, an Opportunity of eſcaping.

Sect. 108. But it ſeems agreed by all the [g] Books, That any other Diſcontinuance in the Proceſs againſt Jurors, ſhall have the ſame Effect as a Diſcontinuance in ſuffering a Chaſm in the Proceſs; but it ſeems, That no ſuch [h] Diſcontinuance, whether in the Proceſs or in the Roll, ſhall in any Caſe diſcontinue or abate the Original Suit; but if it appear before Trial, ſhall cauſe [i] new Proceſs to be awarded where the firſt Fault happened; and if after Trial, a new [k] *Venire* to have the whole [l] Iſſue tried over again; becauſe the firſt *Venire* was executed, and the whole Trial unwarranted. But [m] if Judgment be given on a Verdict by Jurors appearing on a Proceſs any way erroneous, it will be totally erroneous; becauſe the Trial was wholly unwarranted, and conſequently the Iſſue miſtried.

Sect. 109. Alſo, as I apprehend, any other Error in the Proceſs againſt the Jurors, who actually try a Cauſe, will make a [n] Miſtrial, as much as thoſe which are called Diſcontinuances: as where ſuch Proceſs of this Kind is awarded which is not [o] proper in the Caſe, or where it is directed to a [p] wrong Officer, or has a [q] wrong Viſne, or [r] miſrecites the

* 38 E. 3. 2d. b. 29 E. 3. 31. Fitz. Diſcontinuance, 39.
† 21 H. 7. 16. pl. 27. Cont. 40 E. 3. 31. pl. 10. Fitz. Amendment, 14.
‖ Cro. El. 582. pl. 6.
¶ Bro Jour. 36, 54. Diſcontinuance, 23. Error, 169. Amendment, 60. Fitz Jour. 37, 38.
12 E. 4. 11. pl. 1.
9 E. 4. 18. pl. 20.
2 H. 7. 11. pl. 11.
[a] Fitz. Diſcontinuance, 51.
3 H. 4. 10. pl. 10.
[a] *Witherington verſus Charlton.* Trin. 11 Annæ. Vide 1 Salk. 59, 60.
[b] Vide 40 E. 3. 31. pl. 10. Fitz Amendment. 14. 59.
** 2 H. 7. 11. pl. 11.
[c] Vide 1. Bulſt. 141, 142, 143. Yelv. 204, 205. 6 Mod. 281, 282, 283, 285, 286. 1 Salk. 51. Cro. Jac. 284.
[d] 1 Rol. Abr. 779. L. 3. 12 H. 4. 18, pl. 15. 21 H. 7. 16. pl. 27. 38 E. 3. 20. b. 12 H. 4. 3. pl. 5. Bro. Diſcontinuance de Proceſs, 11. Fitz. Diſcontinuance, 39, 40. 19 H. 6. 39. a. Amendment, 27. Bro. Repleader, 2. Diſcontinuance de Proceſs, 1. Error, 3. 1 Fitz. Amendment, 26. Bro. Amendment, 10, 92. Diſcontinuance de Proceſs, 4. 19 H. 6. 39. a. 33. 3 H. 6. 20. pl. 39.
[e] Cro. Jac. 311. pl. 10.
[f] 38 E. 3. 22. b. Fitz. Diſcont. 40. 3 H. 6. 9. a. 27 H. 6. 5. pl. 30 Aſſ. pl. 36. Cont. Bro. Diſcontinuance, 47. *But his Note is not warranted by the Books at Large, which are* 27 H. 6. 5. pl. 33. and 34 H. 6. 20 pl. 39.
[g] 19 H. 6. 39. a. 34 H. 6. 20. pl. 39. Fitz. Amendment, 26, 57. Enqueſt. 18. 29 E. 3. 31, Bro. Amendm. 10. Diſcontinuance, 30. 30 Aſſ. pl. 36.
[h] 6 Mod. 35. Vide 9 286, 287. Fitz. Diſcontinuance, 24, 38. 22 H. 6. 3. b. 4. a.
[i] 2 H. 5. 3. pl. 16. Fitz. Diſc. 28. 29 E. 3. H. 4. 7. b. Bro. Enqueſt, 98.
[l] Faux Judgment, 12. Error, 16. 22 E. 3. 2. pl. 12. 7 H. 6. 31. a.
[m] Vide 1 Danv. Abr. 334, 335, 352, 357, 455, 456.
[n] 7. H. 6. 28. Fitz. Error, 16. P 1 Brow. 134. Cro. El. 574. pl. 15. 586. pl. 16. Moor 356. pl. 482. Yelv. 15. 5 Co. 36. b.
[o] Cro. El. 468. the firſt. Vide ſupra, Ch. 24. Sect. 92. 2 D. Abr. 455, 456. 21 Jac. Ch. 13. 16. and 17 Car. 2. 8.
[p] Cro. Jac. 89 pl. 15.
[q] Cro. El.

former Proceſs, or is [a] miſreturned, or [b] not returned at all, &c. For if Errors of this Kind have ſuch Effect even in Civil Actions, where they are not within ſome of the Statutes of *Amendments* or *Jeofails*, as it ſeems to be admitted that they have, it plainly follows, That they muſt always have it in Criminal Proceedings, ſince [c] no ſuch Proceedings are within the Benefit of any of thoſe Statutes. But if an Error of this Kind, owing wholly to the Miſpriſion of the Clerk, be diſcovered before Trial, and the Amendment of it will ſet the whole Matter right, perhaps it may be [d] amended by the Common Law. And it hath been [e] holden clearly, That even a Diſcontinuance of Proceſs may be amended by Conſent of the Parties.

Sect. 110. Howſoever an Error may be ſo far ſalved by the Party's Appearance, that he ſhall be as much compellable to anſwer the Original, as if there had been no ſuch Error: Yet if he were ſubject to any Diſadvantage in Reſpect of having ſuch Proceſs awarded againſt him; as to the Loſs of his Goods upon an Exigent, or to the Forfeiture of the Privilege of Appearance by Attorney upon a *Pluries*, he [f] ſhall wholly avoid ſuch Diſadvantage when ſuch Award, which ſhould have cauſed it, appears to be any way erroneous, whether in Reſpect of a Diſcontinuance, or Miſcontinuance, or otherwiſe.

Sect. 111. Alſo, for the like Reaſon, it ſeems to be [g] agreed, That if a Man be outlawed, or condemned by Default, for not appearing to Proceſs, which is any way erroneous, he may take Advantage of the Error in Avoidance of ſuch Outlawry, or other Condemnation; for no one ſhall be condemned barely for not appearing, where that which ſhou'd have compelled him to have appeared is defective. But it [h] ſeems, That a Defect in Proceſs in an Outlawry, may be ſalved by the Defendant's purchaſing a Pardon, and ſhewing it to the Court; for that ſuppoſes that there was ſuch an Outlawry againſt him, as needed a Pardon, which, if it were erroneous, it would not do.

Sect. 112. How far a Diſcontinuance of one Appeal will be a bar to another, hath been already conſidered, *Chap.* 23. *Sect.* 130.

And now I am in the ſecond Place particularly to conſider the Nature of Proceſs on a Criminal Accuſation, with a particular Regard to Proceſs of Outlawry only; and for the better underſtanding thereof, ſhall conſider the following Points;

1. Whether Proceſs of Outlawry lie in all Criminal Caſes?
2. In what Manner it is to be awarded in general.
3. What is particularly required in the Award of it againſt the Principal and Acceſſory.

Sect. 113. As to the firſt Point, *viz.* Whether Proceſs of Outlawry lie in all Criminal Caſes: I take it to be certain, That it lies in all Appeals, [i] whether of Felony or Mailem, and in all Indictments of Treaſon or Felony, and on all [k] Returns of a Reſcous; and alſo in all Indictments of [l] Treſpaſs *Vi & Armis*. Alſo it ſeems probable, That it lies on an Indictment of [m] Conſpiracy; or [n] Deceit, or any other Crime of a higher Nature than a Treſpaſs with Force and Arms, but [o] not on any Indictment for a Crime of an inferior Nature.

[a] Cro. Jac. 467. pl. 14. 1 Danv. Ab. 357, 354, 355.
[b] Vide 21 Ja. 13. 1 Danv. Ab. 340. pl. 2, 3. 341. pl. 4, 5. 8 Co. 163. a.
[c] 6 Mod. 283, 284, 285. 1 Salk. 51.
[d] Long quint. E. 4. 140. Bro. Amend. 10, 17, 66, 92. Diſcontinuance de Proceſs, 4. 47. Vide Fitz. Amendment, 59, 75. 29 E. 3. 32.
[e] 21 H. 7. 40. pl. 65. Fitz Amendment. 78.
[f] 10 H. 7. 21. pl. 15. 12 H. 4. 18. pl. 15. 19 H. 6. 29. a. 3 H. 4. 10. pl. 10. S. P. C. 184. Letter D. Vide Bro. Att. 82, 84. Exigent, 20. H. P. C. 271. Fitz. Amendment, 27. Diſcontinuance, 40, 51. Error, 82. *But* 8 H. 5. 2. pl. 9. 43 E. 3. 17. b. 18 E. 3. 34. pl. 47. Fitz. Amendment, 77. Bro. Appeal, 7. *ſeem contrary*.
[g] 3 H. 7. 8, b. 9. a. Fitz Replead. 1. Error, 47. Diſcontinuance de Proceſs, 17. 1 Sid. 160. pl. 3. 260. pl. 7. Bro. Reſtitution, 8. Amendment, 60. 9 E. 4. 18. pl. 20.
[h] 3 H. 7. 10. B. 1. ch. 15. 3. 18 a. b. 21. Fitz. Pro. 22 E. 4. 11.
[i] pl. 10. Fitz. Charter, 25. Diſcontinuance 51. [l] Finch of Law, 346. Theloal digeſt of Writs, pl. 1. 35 H. 6. 6. pl. 9. [k] 13 H. 7. 21. pl. 9. 2 Inſt. 665. Cont. Fitz. Proceſs, 56, 213. 298. [l] 22 E. 4. 11. pl. 31. Finch of Law, 355. Bro. Exigent, 51. 35 H. 6. 6. pl. 9. [m] 8 H. 6. 9. pl. 29. Bro. Exigent, 23, 28, 46. S. P. C. 172. 22 H. 6. 7. pl. 11. [n] 35 H. 6. 6. pl. 9. [o] Vide pl. 31 35 H. 6. 6. pl. 9. Cont. 8 H. 6. 9. pl. 21. Theloal B. 1. Ch. 15.

Sect.

Sect. 114. It ſeems [a] agreed, That it lies not on any Action on a Statute, unleſs it be given by ſuch Statute, either expreſly, as in the Caſe of a [b] *Præmunire*, and many other Caſes; or impliedly, as where a Recovery is given by an Action wherein ſuch Proceſs lay before. And agreeably hereto it hath been adjudged, That it lies not in an Action on the Statutes of [c] Liveries, or of [d] Maintenance, nor in a [e] *decies tantum*, and that it lay not in a Writ of [f] Entry on 5 *Ric.* 2. 7. till it was given by 23 *H.* 8. 14. But that it lies on a Writ of Treſpaſs for a [g] Forcible Entry on 8 *H.* 6. 9. becauſe the Statute expreſly gives a Recovery by ſuch Writ, and ſuch Proceſs lies in it by the Common Law. It ſeems to be holden in the [h] *Year-Book* 8 *H.* 6. That it lies on all Indictments on Statutes; but the contrary is adjudged in [i] 22 *E.* 4. as to the Statutes againſt *Foreſtalling*; and it is there laid down as a general Rule, That it lies not on an Indictment any more than in an Action on a Statute, unleſs it be expreſly or impliedly given by ſuch Statute.

As to the ſecond Point, *viz.* In what Manner Proceſs of Outlawry is to be awarded in general: I ſhall obſerve the following Particulars;

Sect. 115. *Firſt*, That it ſeems to be agreed [k] That in every Indictment or Appeal, for any Crime under the Degree of Capital, there muſt be three *Capias's* to the Sheriff of the ſame County wherein the Proſecution is commenced, before the Exigent ſhall be awarded, unleſs it be after Judgment; in which Caſe one *Capias* is ſufficient. And [m] *Quære*, If three *Capias's* be not ſtill neceſſary in an Appeal of Rape, as they were at the Common Law, notwithſtanding it be made [n] Felony by Statute?

Sect. 116. *Secondly*, That it ſeems to be [o] agreed, That one *Capias*, before the Award of the Exigent, hath always been ſufficient in an Indictment or Appeal of Death, or High Treaſon; but that it ſeems [p] doubtful, whether two *Capias's* were not required by the Common Law, in all Indictments and Appeals of any other Felony. However it is certain, That they are required in all Indictments of any other Felony, by 25 *E.* 3. 14. by which it is accorded, *That if after any Man be indicted of Felony, before the Juſtices in their Seſſions, to hear and determine, it ſhall be commanded to the Sheriff, to attach his Body by Writ or by Precept, which is called a* Capias; *and if the Sheriff return that the Body is not found, another ſhall be incontinently made, returnable at three Weeks after, wherein it ſhall be compriſed, that the Sheriff ſhall cauſe to be ſeiſed his Chattels, and ſafely to keep them till the Day of the Writ or Precept returned. And if the Sheriff return, That the Body is not found, and the Indictee cometh not, the Exigent ſhall be awarded, and the Chattels ſhall be forfeit, as the Law of the Crown ordaineth. But if he come and yield himſelf, or be taken by the Sheriff, or by other Miniſter, before the Return of the ſecond* Capias, *then the Goods and Chattels ſhall be ſaved.* It ſeems to have been the general [q] Opinion, That this Statute extends to Appeals as well as Indictments, tho' it mention only the later; but that it extends not to any Indictment or Appeal of Death, tho' it ſpeak of Felony in general.

Sect. 117. *Thirdly*, [r] That after the Sheriff hath returned a *Cepi*, if he have not the Body at the Day, the Court will not award an Exigent on the Suggeſtion of an Eſcape, unleſs the Sheriff will return one.

[a] 22 E. 4. 11. b. 8 H. 6. 9. pl. 21. Fitz. Proceſs 81. Bro. Proceſs, 57. Exigent, 25.
[b] Fitz. Proceſs, 106. 9 E. 4. 2. pl. 8. *See the Statute againſt Proviſors*, 27 E. 3.
[c] 8 H. 6. 9. pl. 21.
[d] 22 E. 4. 11. b. Cont. Fitz. Proceſs, 89.
22 H. 6. 7. pl. 11. *Quære* Bro. Exigent, 28.
[e] 8 H. 6. 9. pl. 21.
35 H. 6. 6. pl. 9. Bro. Proceſs, 145.
[f] 35 H. 6. 6. pl. 9 Fitz. Proceſs, 101. Bro. Proceſs, 16.
[g] Bro. Exigent 35. 37. H. 6. 23. pl. 11.
[h] 8 H. 6. 9. pl. 21. Fitz. Proceſs, 81.
[i] 22 E. 4. 11. b. Bro. Exigent, 51. Vide 35 H. 6. 6. pl. 9. 37 H. 6. 23. pl. 11.
[k] Finch of Law, 351, 355. Raſt. Entr. 188, pl. 18. 302, pl. 1, 2, 3 26 E. 3. 72. pl. 13. Fitz. Exigent 30. Utlagary 17. Error 82. Vide 3 H. 6. 9. a. 3 H. 4. 11. pl. 10.
[l] 40 E. 3. 25. pl. 28. Exigent 7. 27. 67.
[n] Vide pl. 8. Finch S. P. C. 67. 8.
[r] S. P. C. Finch 476.
[m] 1 Vide 16 Aſſ. pl. 13. Fitz. Exigent 10. Coro. 173. Bro. Proceſs, 148. Exigent, ſupra, Ch. 23. Sect. 59, to 70.
[o] S. P. C. 67. a. H. P. C. 209. Fitz. Coro. 234. 1 H. 5. 5. 351.
[p] Fitz. Coro. 184. 234. 22 Aſſ. pl. 97. Cont. 8 H. 5, 6. pl. 25. Fitz. Exigent, 3. [q] H. P. C. 209. Vide Fitz. Exigent, 3, 28, 30. Proceſs 226. 8 H. 5. 6. pl. 25. 1 H. 5. 6. pl. 70. Let. G. Fitz. Exigent, 25. 30. Aſſ. pl. 23.

Sect.

Sect. 118. *Fourthly*, That if there be ſeveral Appellees, ſome of which appear, and others make Default, and thoſe who appear plead a Plea in Abatement of the Writ, or any ſuch Plea in Bar as goes to the Whole, the Suit [a] ſhall be continued againſt thoſe who made Default by *Capias* only, and no Exigent ſhall iſſue till ſuch Plea or Pleas ſhall be determined.

[a] H. P. C. 210. S. P. C. 70. Lett. B.

Sect. 119 *Fifthly*, That an Exigent ſhall [b] never be awarded to the Sheriff of any other County than that wherein the Offence is laid; and that by the [c] Common Law there was no [d] neceſſity of a *Capias* to the Sheriff of any other County. But the Law relating to this Matter, having been altered by ſeveral Statutes, I ſhall ſet forth thoſe Statutes in particular, and endeavour to ſhew how they are to be underſtood.

[b] Fitz. Exigent, 26. Default 10, 97. 22 E. 3. 11, pl. 4. 30 H. 6. 2. pl. 7. 11 H. 4. 72. pl. 6.

[c] Fitz. Proceſs, 4, 34.

Sect. 120. And firſt it is enacted by 6 *H.* 6. 1. *That before any Exigent be awarded againſt Perſons indicted in the King's Bench, of Treaſon or Felony, Writs of* Capias *ſhall be directed as well to the Sheriff or Sheriffs of the County wherein they be indicted, as to the Sheriff or Sheriffs of the County whereof they be named in the Indictments, the ſame* Capias *having the Space of ſix Weeks at the leaſt, or longer Time, by the Diſcretion of the ſaid Juſtices, if the Caſe require it, before the Return of the ſame; which Writs ſo returned, the Juſtices ſhall proceed in the Manner as they had done before the Statute: And if any Exigent be awarded or any Outlawry pronounced againſt ſuch Perſons before the Return of the ſaid Writs, the ſame Exigent, ſo awarded, with the Outlawry thereof pronounced, ſhall be void, and holden for none.*

See the Preamble of 6 H. 6. 1. and 8 H. 6. 10.

[d] Vide Fitz. Proceſs, 1, 3, 34, 155, 164. 22 E 3. 11. pl. 4. 47 Ed. 3. 4. pl. 7. Dyer 295 pl. 18. 30 H. 6. 2. pl. 7. 11 H. 4. 72. pl. 6.

Sect. 121. And it is farther enacted, by 8 *H.* 6. 10. *That upon every Indictment or Appeal, by the which any Subject dwelling in other Counties than where ſuch Indictment or Appeal ſhall be taken, of Treaſon, Felony, and Treſpaſs, before the Juſtices of Peace, or before any other, having Power to take ſuch Indictments or Appeals, or other Commiſſioners or Juſtices, in any County, Franchiſe or Liberty, of* England, *before any Exigent awarded, preſently after the firſt Writ of* Capias *returned, another Writ of* Capias *ſhall be awarded, directed to the Sheriff of the County whereof he, who is ſo indicted, is or was ſuppoſed to be converſant by the ſame Indictment, returnable before the ſame Juſtices, before whom he is indicted, or appealed, at a certain Day, containing the Space of three Months, from the Date of the ſaid laſt Writ, where the Counties be holden from Month to Month; and where the Counties be holden from ſix Weeks to ſix Weeks, the Space of four Months, until the Day of the Return of the ſaid Writ; by which Writ of ſecond* Capias, *the Sheriff ſhall be commanded to take him which is ſo indicted or appealed, by his Body, if he can be found within his Bailiwick: And if he cannot be found within his Bailiwick, to make Proclamation in two Counties before the Return of the ſame Writ, that he which is ſo indicted or appealed, ſhall appear before the ſaid Juſtices,* &c. *at the Day contained in the ſaid Writ, to anſwer,* &c. *After which Writ ſo ſerved and returned, if he which is ſo indicted or appealed, come not at the Day of ſuch Writ returned, the Exigent ſhall be awarded. And that every Exigent and Outlawry otherwiſe awarded, or pronounced, ſhall be holden for none, and void.*

Sect. 122. But it is expreſly provided, *That the above-recited Statute, concerning Proceſs to be made before the King in his Bench, ſtand in force. And that this preſent Statute ſhall not extend to Indictments or Appeals taken within the County of* Cheſter. *And that if any Perſons ſhall be indicted or appealed of Felony or Treaſon, and at the Time of the ſame Felony or Treaſon ſuppoſed, was converſant within the County, whereof the Indictment or Appeal makes mention, the like Proceſs be made againſt them as was uſed before.*

Sect. 123. And it is farther enacted by 10 *H.* 6. 6. *That ſuch ſecond* Capias, *as is required by* 8 H. 6. 10. *ſhall be awarded upon Indictments or Appeals, removed into the King's Bench, or elſewhere, by* Certiorari *or otherwiſe.*

Sect. 124. It is obſervable that it ſeems to be holden generally in many [a] Books, That every Outlawry whatever, on an Indictment or Appeal againſt a Perſon living in a County different from that wherein the Court ſits, is erroneous, if no ſuch *Capias*, with a Command to the Sheriff to make Proclamation, as is given by 8 *H.* 6. were awarded to the Sheriff of the County wherein the Party is ſuppoſed to be conver-ſant, before the Award of the Exigent: And there are [b] Precedents where-in Outlawries in Appeals, originally commenced in the King's Bench, have been reverſed for want of ſuch a *Capias*. Yet it ſeems, That on the other Side it may be probably argued, That Indictments of Treaſon or Felony, originally commenced in the King's Bench, are expreſly provided for by the [c] Statute of 6 *H.* 6. which requires, That a *Capias*, having the Space of ſix Weeks or more, ſhall be awarded to the Sheriff of the County where-of the Indictee ſhall be named; and this Statute is taken Notice of by that of 8 *H.* 6. which expreſly enacts, That it ſhall ſtand in its full Force, and therefore cannot well be imagined to intend either to ſuperſede or repeal it. Eſpecially, conſidering that it begins with Juſtices of Peace, and makes no expreſs mention of the King's Bench; And it is a [d] general Rule, in the Conſtruction of Statutes, That where Things of an inferior Degree are firſt mentioned, thoſe of a higher Dignity ſhall not be included under ſubſequent general Words. Alſo it appears from the Preamble of 10 *H* 6. 6. That neither Indictments nor Appeals, removed into the King's Bench by *Certiorari*, were within the Benefit of 8 *H.* 6. 10. before the making of that Statute, which expreſly provides for Indictments and Appeals ſo removed; and there ſeems at leaſt as good Reaſon, that Indictments and Appeals, originally commenced in the King's Bench, ſhall not be taken to be within the Benefit of it. To which may be added, That it ſeems to have been admitted in the *Year-Book* of [e] 31 *H.* 6. that an Appeal, originally commenced in the King's Bench, is within the Equity of 6 *H.* 6. 1. and that an Outlawry thereon is erroneous, if there were no *Capias* containing the Space of ſix Weeks, directed to the Sheriff of the County whereof the Appellee is named, as that Statute requires; by which it ſeems to be implied, That ſuch an Appeal is not within the 8 but 6 *H.* 6. and that the ſame is ſtill in force.

[a] 1 E. 4. 1. pl. 3. 19 H. 6. 2. pl. 2. S. P. C. 67, 68, 69. H. P. C. 209. Fitz. Proceſs, 103. 39 H. 6. 1. pl. 2.

[b] Ra. Entr. 304, pl 2, 3. Vide 19 H. 6. 2. pl. 2. Fitz. Error, 26. Ra. Ent. 52. pl. 1, 2.

[c] Vide ſupra, Sect. 120.

[d] 2 Co. 46. b.

[e] 31 H. 6. 11: pl. 8.

Sect. 125. It ſeems to have been [f] agreed, That by Force of theſe Statutes, a *Capias* ſhall be awarded into a County-Palatine, where the Defendant is named of any Place in ſuch County, in any Indictment or Appeal; and it ſeems, That ſuch *Capias* ſhall be directed to, and returned by the [g] Chancellor of ſuch County; and it hath been [h] ſaid, That if he will not return it, the Exigent may be awarded as well as if he had returned it; becauſe the Court cannot compel him to return it, and the Proſecution might be unreaſonably delayed, if the Proceedings were to be ſtayed till he ſhould return it. But [i] *Staundeforde* makes a *Quære*, Whether the Court of King's Bench may not enforce a Return of the Writ?

[f] S. P. C. 68. Letter D. H. P. C. 209, 210. 19 H. 6. 2. 31 H. 6. 11: pl. 11. Fitz Cor. 19. Bro. Cinque-Ports, 22 Sed vide 1 H. 6. 10.

[g] Ra. Entr. 52. pl. 1, 2. 19 H 6 2. 31 H. 6. 11. Cont S. P. C. 68. Letter D. Fitz Proceſs, 197 Bro. Cinque-Ports, 22. [h] 31 H. 6. 11. pl. 8. Fitz. Proceſs, 103. Dyer 214. pl. 44. Bro. Proclamation, 5.

Sect. 126. If a Defendant be expreſly named of the ſame County wherein he is indicted or appealed, and be alſo named under an *alias dictus* of another, it hath been [k] adjudged, That there is no need of any *Capias*,

[i] S. P. C. 69. a. V de Cro. Ca. 252, 253. [k] 1 E. 4. 1. pl. 3. S. P. C. 68. b.

with a Command for Proclamation, according to 8 *H.* 6. becauſe that which comes under the *alias dictus* is [a] no way traverſable nor material. Alſo if a Defendant be named of *B.* and late of *C.* there is [b] no need of any *Capias* to the Sheriff of the County wherein *C.* lies, becauſe it appears that the Defendant is at preſent converſant at *B.* But if a Defendant be named of no certain Place at preſent, but only late of B, and late of C, and late of *D. &c.* being all of them in Counties different from that wherein the Proſecution is commenced, a *Capias* ſhall go the Sheriff of [c] every one of thoſe Counties.

[a] Supra Ch. 25. Sect. 72.
[b] S. P. C. 68. Lett. B. Fitz. Proceſs, 192. Crompton, 152.
[c] H. P. C. 210.

Sect. 127. Notwithſtanding the Words are expreſs, That any Outlawry pronounced contrary to the Directions of the Statutes, ſhall be void: Yet it ſeems to be agreed, [d] That it is not to be taken to be utterly void, but only voidable by Writ of Error.

[d] 39 H. 6. 1. pl. 2. Bro. Utlagary 34. Error, 16. 19 H. 6. 2. pl. 2. Fitz Error, 26. Cro. El. 179. pl. 10. 3 Co. 59. b. Plow. Com. 137. b.

Sect. 128. As to the third Point, *viz.* What is particularly required in the Award of Proceſs of Outlawry againſt the Principal and Acceſſary, it is recited by the Statute of *Weſtminſter*, 1. 14. *That it had been uſed in ſome Counties to outlaw Perſons being appealed of Commandment, Force, Aid or Receipt, within the ſame Time that he which is appealed for the Deed is outlawed: And thereupon it is provided, That none be outlawed upon Appeal of Commandment, Force, Aid or Receipt, unleſs he that is appealed of the Deed be attainted: So that one like Law be uſed therein thro' the Realm; nevertheleſs, he that will ſo appeal, ſhall not, by Reaſon of this, intermit or leave off to commence his Appeal at the next County againſt them, no more than againſt their Principals, which be appealed of the Deed, but their Exigent ſhall remain, until ſuch as be appealed of the Deed be attainted by Outlawry or otherwiſe.*

In the Conſtruction of this Statute, the following Particulars ſeem moſt remarkable;

Sect. 129. *Firſt*, That it ſeems to be [e] agreed, That it extends as well to Indictments as to Appeals, not only becauſe the Word [f] Appeal in the Statute may, in a large Senſe, be taken for any Accuſation in general; but becauſe Indictments are certainly as much within the Reaſon of the Statute, as Appeals; and the Common Law, for the [g] Settling whereof this Statute was made, did [h] not make any Diſtinction in this Reſpect between Appeals and Indictments.

[e] H. P. C. 210. 2 Inſt. 183. S. P. C. 46, 69 Lett. A.
[f] 9 Co. 119 a.
[g] S. P. C. 44. Lett. G. 46. Lett. A. 69. Lett. B.
[h] Bract. f. 127. b. 128. a. See Britt. f. 5. 2 Inſt. 183.

Sect. 130. *Secondly*, That it ſeems alſo to be [i] agreed, That wherever ſome of the Defendants are expreſly charged as Principals, and others as Acceſſories, before the Award of the Exigent, the Outlawry thereon of thoſe charged as Acceſſories, cannot but be reverſible; becauſe it appears upon the Record, That the Exigent iſſued contrary to the Directions of the Statute. But if ſeveral be outlawed on a Writ of Appeal, which [k] chargeth them all alike, without any Diſtinction, I ſee [l] not how any Advantage can be taken of the Appellant's not having purſued the Statute, ſince it appears not but that he might have charged them all as Principals.

[i] 43 E. 3. 17. b. 18. a. 34. pl. 47. 44 Aſſ. pl. 16. Ra. Entr. 48. b.
[k] Vide H. P. C. 210 2 Inſt. 183. S. P. C. 46. Lett. B. 70. Lett. A. 148.
[l] Vide 43 E. 3. 17. b. 18. a. 34. pl. 47. 44 Aſſ. pl. 16. Lett. A.

Sect. 131. *Thirdly*, That it is holden both by [m] *Staundforde*, [n] *Coke*, and [o] *Hale*, That if an Appellant take out the Exigent at the ſame Time againſt all the Defendants he muſt when they appear, count againſt them all as Principals, and ſhall be concluded to count againſt ſome as

[m] S. P. C. 46. Lett. B. 70. Lett. A. [n] 2 Inſt. 183. [o] H. P. C. 210. 7 H. 4. 27. Fitz. Coro. 80. 20 E. 3. 7. b.

Bro. Appeal, 7. 79. Bro. Exigent, 44. Fitz. Forfeiture, 14.

The Principal Authorities in the Old Books for the Maintenance of this Opinion ſeem to be

Principals, and others as Acceſſories, becauſe he has taken out ſuch Proceſs againſt them which is erroneous, where all are not Principals. But granting that an Exigent taken out at the ſame Time againſt all the Defendants, appear to have been erroneous, when by the Declaration it appears that ſome of the Defendants are accuſed only as Acceſſories, and therefore ought not to have had an Exigent awarded againſt them, till the Principal had been attainted. Yet ſeeing this is only an Error in the Proceſs to bring in the Defendant, and all ſuch Errors are ſalved by an Appearance, as the Law ſeems to be now ſettled, and hath been more fully ſhewn *Sections* 107, *&c.* It ſeems[a] queſtionable at this Day, Whether an Appellant may not be at liberty to declare as he pleaſes againſt Defendants appearing on ſuch an Exigent? However it is certainly ſafeſt, [b] and moſt adviſeable for an Appellant when he comes to the Exigent to ſhew which of the Defendants he intends to charge as Principals, and which of them as Acceſſories, and to take out the Exigent againſt the former only, and a *Capias* againſt the others.

[a] See 40 Aſſ. pl. 25. *where it appears that Perſons appealled as Acceſſaries, and brought in by an Exigent, were ſtill proceeded againſt as Acceſſories.*

Sect. 132. *Fourthly*, That it ſeems the better [c] Opinion, That where there are more than one Principal, the Exigent ought not to iſſue till all of them are attainted. *See alſo* 43 E. 3. 17. b. 18. a. 35. pl. 47. 44 Aſſ. pl. 16.

Bro. Appeal, 7. Exigent, 44. Fitz. Forfeiture, 14. [b] Bro. Appeal 107. 20 E. 3. 7. b. Plowd. Com. 29. a. dubitatur 7 H. 4 36. pl. 5. Bro. Appeal, 22. Contr. Fitz Exigent, 4. [c] 2 Inſt. 183.

CHAP. XXVIII.

Of Arraignment in general.

HAving ſhewn in what Manner a Perſon under a Criminal Accuſation is to be brought into Court; I ſhall in the next Place endeavour to ſhew in what Manner he is to be arraigned or put upon his Trial; and this I ſhall conſider,

Firſt, As it relates to all Criminals in general.
Secondly, As it relates to Principal and Acceſſories in particular.

And firſt, As to the Arraignment of all Criminals in general: Having already ſhewn in the Twenty-fifth [d] Chapter, That regularly the Court will not arraign a Man upon an Indictment while an Appeal for the ſame Crime is depending againſt him; I ſhall here conſider only the following Particulars;

[d] Sect. 15.

Firſt, In what Manner a Criminal is to be arraigned.
Secondly, Whether the Omiſſion of it will be Error.
Thirdly, Where a Perſon ſhall be arraigned upon ſeveral Appeals or Indictments.

As

As to the first Particular, *viz.* In what Manner a Criminal is to be arraigned, I shall observe,

Sect. 1. *First*, That every Person, at the Time of his Arraignment, ought to be used with all the [a] Humanity and Gentleness which is consistent with the Nature of the Thing, and under no other Terror or Uneasiness than what proceeds from a Sense of his Guilt, and the Misfortune of his present Circumstances; and therefore ought not to be brought to the Bar in a contumelious Manner; as with his [b] Hands tied together, or any other Mark of Ignominy and Reproach; nor even with Fetters on [c] his Feet, unless there be some Danger of a Rescous or Escape. It seems indeed to have been holden by [d] some, That this is a particular Privilege of Persons in Holy Orders. But it seems the [e] better Opinion, That the Law makes no Distinction in this Respect, between them and Laymen.

Sect. 2. *Secondly*, That there is no necessity that a Prisoner at the Time of his Arraignment hold up his Hand at the Bar, or be commanded so to do; for this is [f] only a Ceremony for making known the Person of the Offender to the Court; and if he answer that he is the same Person, it is all one.

Sect. 3. *Thirdly*, That on every Indictment the Arraignment must be in *English*, by Vertue of 37 *E.* 3. 15. by which it is enacted, *That all Pleas which shall be pleaded in any Courts whatsoever, before any of the King's Justices whatsoever, or in his other Places, or before any of his other Ministers whatsoever, or in the Courts and Places of any other Lords whatsoever within the Realm, shall be pleaded, shewed, defended, answered, debated, and judged in the* English *Tongue, and entred and inrolled in* Latin. But it seems to have been always taken, That Appeals are not within this Statute, but that they are to be arraigned, and the Plea of the Defendant to be read, in [g] *French*, in the same Manner as antiently; and thus I have often known it done in my own [h] Experience; but upon what Reason this Difference between Appeals and all other Prosecutions is grounded, I have never heard.

Sect. 4. *Fourthly*, [i] That an Appeal in the King's Bench ought to be arraigned on the Plea side, unless it come in by *Certiorari*, in which Case it is said, That it ought to be arraigned on the Crown-side.

Sect. 5. *Fifthly*, That where a Writ of Appeal is abated, the Prisoner shall not [k] be arraigned on the Count, at the Suit of the Party, because the Count depends upon the Writ, and that being determined, all [l] falls to the Ground. Yet it seems certain, That if the Writ were good, the Appellee may in many Cases be arraigned at the Suit of the King upon the Count, as hath been more fully shewn, *Ch.* 23. *Sect.* 7, 8, 9, 10, 11, 12, 13.

Sect. 6. As to the second Particular, *viz.* Whether the Omission of an Arraignment will be Error: It is said in the Third [m] *Modern Report* That an Attainder of High Treason was reversed for this and other Errors. Neither do I find any Precedent of an Attainder in *Coke's Entries*, on an

[a] 3 Inst. 34, 35. 2 Inst. 315, 316.

[b] Bracton, 137. pl. 3. Briton. 14, 17. Fleta Lib. 1. cap. 31.

[c] Bracton, 137. pl. 3. 3 Inst. 34, 35. H P. C. 212. Kely. 10.

[d] Fitz Coro. 432. S. P. C. 133. Lett. H.

[e] 3 Inst. 34, 35. H. P. C. 212. 2 Inst. 315. Briton, 14, 17. Bracton, 137. pl 3 S. P. C 133. Letters F. G Kely. 10.

[f] *Agreed by all the Judges in the Lord* Stafford's *Case*. Raym. 408.

[g] 1 Sid. 324. pl. 4. 2 Jon. 210. Cro. El. 69. pl. 22. 1 Salk. 61.

[h] *As in the Case of* Smith *and* Bowen, *Mich.* 7 *Annæ And that of* Widdington *and* Charlton. *Trin.* 11 *Annæ. And that of* Reeve *and* Trundal, *Paschæ* 3 *Geo.*

[i] 2 Jon. 210. 1 Sid. 324. pl. 4. 1 Salk. 62.

[k] Style's Rep. 7.

[l] Bro. App. 44. 4 H. 6. 16. Vide supra, Ch. 23. Sect. 10.

[m] 3 Mod. 265. Vide Raym. 408.

Indictment of [n] Treaſon or * Felony, in which it is not expreſſed either in theſe Words, *Ad barram hic dictus in propria perſona ſua committitur mareſchallo, &c. & ſtatim de præmiſſis* (in Caſe of Felony, or *de altis proditionibus*, in Caſe of High Treaſon) *ei ſuperius impoſitis allocutus qualiter ſe velit inde acquietare dicit, &c.* or in Words [a] tantamount. And therefore it is certainly ſafeſt to expreſs it in every Record of ſuch Attainder, where the Party appears and is condemned, whether upon Confeſſion or Verdict, or ſtanding Mute, *&c.* Yet I find it wholly omitted in every Attainder upon an [b] Appeal in *Coke's Entries*, and much oftner [c] omitted than expreſſed [d] in ſuch Attainders in *Raſtal.*

[n] Coke's Ent. 360, pl. 14, 361. pl. 15, 16.

[a] Coke's Entr. 352. pl. 2, 3. 354. b. 355, pl. 7, 8, 356, pl. 9. 358, pl. 11, 360. pl. 13.

Sect. 7. As to the third Particular, *viz.* Where a Perſon ſhall be arraigned upon ſeverall Appeals or Indictments: It ſeems, That by the Common Law, if a Man be appealed of divers Robberies at the Suit of divers Perſons, he may be ſeverally [e] arraigned on each Appeal, and then ſeverally tried on each, that each Appellant may be equally intitled to the Reſtitution of his Goods, upon the Conviction of the Apellee. And in like Manner at this Day a Perſon charged with ſeveral [f] Indictments of Robbery at the Proſecution of ſeveral Perſons, may be ſeverally arraigned and tried on each Indictment; becauſe the Proſecutor ſince the Statute of 21 *H.* 8. 11. is intitled to a Reſtitution of his Goods upon a Conviction on ſuch an Indictment, in the ſame Manner as the Plaintiff is upon a Conviction in an Appeal. And it is holden both by [g] *Staundforde* and [h] *Hale*, That even a Perſon attainted of Robbery at the Suit of one Perſon, may be arraigned and tried at the Suit of another, if ſuch Suit were commenced before the Attainder: But *Quære:* For of the Authorities cited for the Maintenance of this Opinion two [i] ſeem to be directly againſt it; and the [k] other, which ſeems moſt to the Point, does not come up to it.

[a] See Raſt. Ent. 42 pl. 2.

[b] See Coke's Entr. *from f.* 53 *to* 60.

[c] See Ra. Ent. 47, a. b. 48, a. b. 49, a. b. 50, a. b. 52, a. 54, a. 55. b.

[d] See Raſt. Ent. 42. pl. 2. 53. pl. 6.

[e] 4 E. 4. 11. pl. 18. H. P. C. 212.

[f] S. P. C. 66. Letter E. H. P. C. 212.

Sect. 8. It is made a *Quære* by [l] *Staundforde*, Whether a Priſoner before his Attainder ſhall anſwer to divers Appeals of Death or Rape, in the ſame Manner as in the Caſe of Robbery?

[g] S. P. C. 66. Letters A. B. 107. Letter B. 160. b. Fitz. Coro. 26, 27.

[h] H. P. C. 212, 248. [i] Fitz. Coro. 379. 7 H. 4. 31. pl. 16. *Abridged* Fitz. Coro. 81. [k] 4 E. 4. 11. pl. 18. *Abridged* Fitz. Coro. 26, 27. *See* 44 E. 4. 44. pl. 57. *Abridged* Fitz. Coro. 95. *See alſo Chap.* 23. *Sect.* 53. *and the Chapter concerning the Plea of Autrefoits convict and attaint.* [l] S. P. C. 66. Letter C.

CHAP. XXIX.

Of the Arraignment of the Principal and Accessary.

AND now I am in the second Place to consider the Nature of Arraignment, so far as it particularly relates to Principals and Accessaries; for the better understanding whereof, it may not be improper to consider,

1. In what Cases, in Judgment of Law, a Man shall be said to be a Principal, and in what Cases he shall be said to be an Accessary.
2. Where he shall be adjudged an Accessary before.
3. Where an Accessary after.

Sect. 1. And *First*, For the better understanding in what Cases a Man shall be said to be a Principal, and in what an Accessary; having premised, That where a Felony is committed by divers Persons, the [a] same Man may be a Principal and Accessary in it, and so charged in the [b] same Indictment or Appeal; as where *A.* commands *B.* to kill *C.* and afterwards actually joins with him in the Fact. And having also farther premised, That it is agreed by all the Books, That a Man may be an Accessary after the Fact, by [c] receiving one who was an Accessary before, as well as by receiving a Principal; and that there seems to be the same [d] Reason, that a Man may be an Accessary before the Fact, by procuring another to be in such Manner an Accessary to the Principal, I shall endeavour to shew,

[a] H. P. C. 219. 3 Inst. 139. Keilw. 107. Fitz. Coro. 80.
[b] 7 H. 4. 27. pl. 4. Fitz. Coro. 80. Vide Fitz. Coro. 176, 285.
[c] Lamb. B. 2. Ch. 7. f. 291. 26 Ass. pl 52. Bro. Coro. 104. Fitz. Coro. 196. Crompt. Just. 42. pl. 24. S. P. C. 43. Letter D.
[d] *See the Books above-cited, and* H. P. C. 219.

1. In what Offences there can be no Accessaries, but all must be Principals, if any way guilty.
2. Where those who only abet a Fact shall be esteemed as much Principals in it as those who actually do it.
3. Where those who are actually absent when a Fact is committed may be esteemed Principals in it.
4. Where one shall be adjudged a Principal in an Offence against a Statute.
5. Whether the Offence of an Accessary can ever rise higher than that of the Principal.

Sect. 2. As to the first Particular, *viz.* In what Offences there can be no Accessaries, but all must be Principals, if any way Guilty: It seems to have been always an uncontroverted Maxim, That there can be no Accessaries in [e] High Treason, or [f] Trespass. Also it seems to have been always agreed, That whatsoever will make a Man an Accessary before in

[e] 3 Inst. 20, 21, 138. Dalis. 16. pl. 81. H. P. C. 215. 12 Co. 81, 82. 2 Inst. 183. Bro. Treason, 19. 3 H. 7. 10. pl. 2. Fitz. Coro. 55. 19 H. 6. 47. pl. 103. S. P. C. 3. Lett. A. 40. Lett. C. Bro. Coro. 135. Dalt. Ch. 108. Crompt. 42. pl. 19. Co. Litt. 57.
[f] 12 Co. 81, 82. 2 Inst. 183. Bro. Rape, 3. Co. Litt. 57.

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Felony, will make him a Principal in [a] High Treason and Trespass; as [b] Battery, [c] Riot, Rout, [d] Forcible Entry, and even in [e] Forgery and [f] Petit Larceny. And therefore, where-ever a Man commands another to commit a Trespass, who afterwards commits it in pursuance of such Command, he [g] seems by necessary Consequence to be as Guilty of it, as if he had done it himself; from whence it follows, That being in Judgment of Law a Principal Offender, he may be tried and found [h] Guilty, before any Trial of the Person who actually did the Fact.

Sect. 3. It was formerly a [i] Question, Whether the same Receipt of an Offender, which will make the Receiver an Accessary after the Fact in the Case of Felony, will make him a Principal in High Treason, as it seems to be [k] settled at this Day that it will? For if it shou'd be adjudged a Misprision only, as [l] some have contended, a Man wou'd be subject to a less Punishment for receiving a Traitor than for receiving a Felon; for he who receives a Felon is certainly liable to Judgment of Death, as being an Accessary to the Felony, but he who receives a Traitor wou'd be liable only to Fine and Imprisonment, as being guilty of a Misprision only.

Sect. 4. It seems [m] agreed, That whosoever agrees to a Trespass on Lands or Goods done to his Use, thereby becomes a Principal in it. But that no one can become a Principal in a Trespass on the Person of a Man by any such Agreement. Also it seems [n] agreed, That no one shall be adjudged a Principal in any Common Trespass, or inferior Crime of the like Nature, for barely receiving, comforting and concealing the Offender, tho' he know him to have been Guilty, and that there is a Warrant out against him, which by Reason of such Concealment, cannot be executed. And if he cannot be punished as a Principal, it is certain that he cannot be punished as an Accessary; because in such Offences, all who are punished as Partakers of the Guilt of him who did the Fact, must be punished as Principals in it, or not at all. Yet if a Man knowing that there is a Warrant against such Offender, advise and persuade him to absent himself, [o] perhaps he may be indictable for a Contempt of the Law in hindring the due Course of Justice.

Sect. 5. It is certain, That in [p] Petit Treason, and also such Felony as shall have [q] Judgment of Death, there may be Accessaries both before and after the Fact, who must be proceeded against as such, and not as Principals, as shall be more fully shewn in the following Part of this Chapter. Also it seems, [r] That there may be Accessaries before the Fact in Mayhem, but that the Appellant hath his [s] Election to proceed against them either as Principals, or as Accessaries. [t] But I find it no where holden, that there can be Accessaries in Mayhem after the Fact.

Sect. 6. I do not find it agreed, [u] Whether there can be any Accessaries in *Præmunire?*

Sect. 7. As to the second Particular, *viz.* Where those who only abet a Fact, shall be esteemed as much Principals in it as those who actually do it: It seems to have been [x] anciently the more prevailing Opinion, That

[a] 19 H. 6 47. pl. 103. Bro. Treason, 9. Fitz. Coro. 8. 3 Inst. 138. [b] 38 Ass. pl. 9. Keilw. 55. pl. 4. [c] Co. Litt. 57. [d] B. 1. Ch. 64. S. 22. Co. Litt. 57. Fitz. Gard. 99. [e] Moore 666. pl. 913. Vide 1 Sid. 312. pl. 25. [f] Cro. E. 750. pl. 4. 2 Inst. 183. 12 Co. 81. Cont. H. P. C. 223. [g] Moore 787. H. P. C. 217. Pl. Com 475. Vide Infra, Sect. 7. Fitz. Coro. 314, 433. S. P. C. 41. Lett. D. *Quære* Moor, 53. pl. 155. [h] Bro. Tres. 256. 1 Lev. 124. 29 Ass. pl. 59. Fitz. Ass 291. Cont. 27 Ass. pl. 4. *Quære* Vaugh. 115, 116. [i] Dyer 296. pl. 21. 12 Co. 81, 82. 3 Inst. 138. Dalt. Ch. 89. 108. Crompt. 42. pl. 19. Vide 3 H. 7. 10. pl. 2. S. P. C 3. Lett. A. [k] H. P. C. 215. 3 Inst. 138. Dalt. Ch. 108. Crompt. 42. pl. 19. Vide supra, Sect. 2. and 296. pl. 21.

B. 1. Ch. 20. Sect. 3. 4. S. P. C. 3 Lett. A. Bro. Treason, 19. Bro. Coro. 135. [l] Dyer [m] Cro. El. 824. 38 Ass. pl. 9. Bro. Disseisor, 98. Bro. ejectione Custodiæ, 8. Bro. Trespass, 256. 38 E. 3. 18. a. b. Co. Litt. 180. b. Fitz. Gard. 89. [n] Popham 134. 2 Rol. Abr. 75. Letter A. pl. 3. [o] 2 Rol. Ab. 75. Lett. A. pl. 4. [p] Dalis. 16. pl. 11. 3 Inst. 20, 21. Crompton, 42. pl. 19. S. P. C. 40. Lett. C. B 1. Ch. 32. Sect. 5, 6. [q] 12 Co. 81, 82. Cro. El. 750. pl. 4. 2 Inst. 183. [r] *See the Citations to the next Letter.* Cont. Bro. Appeal, 154. [s] Vide supra Ch. 23. Sect. 19. 22 Ass. pl. 82. Fitz. Coro. 11, 182, 215, 221. Cont. 40 Ass. pl. 1. Bro. Appeal, 71. 154 [t] Vide Supra, Sect. 4. [u] Vide S. P. C. 44. Lett. F. Dalt. ch. 108. Bro. Præmunire, 4, 6. Pl. Com. 97. b. [x] Pl. Com. 99 b. Fitz. Coro. 90, 216. 40 Ass pl. 8 & 25. Bro. Coro. 11. 40 E. 3 42. pl. 22. S. P. C. 48. Lett. G. H. 41. Lett. A. B. 44 E. 3. 38. pl. 35. See Bract. B 3. Ch. 12. Sect. 10, 11, 13. Ch. 19. S. 11. Ch. 21. Sect. 8, 10, 11. Lamb. B. 2. ch. 7. fol. 283. Stat. of West. 1. ch. 14. Contr. Fitz. Coro. 433.

those

those only were to be adjudged Principals in Felony who actually did the Fact; as in Murder, those only who gave the mortal Blow; in Rape, those only who actually ravished the Party, *&c.* and that those in the Company who were only present and abetted and encouraged the Doing it, were to be esteemed Accessaries; or at most Principals in the [a] second Degree only. But I take it to be settled at this Day, That all those who [b] assemble themselves together with a felonious Intent, the Execution whereof causes either the Felony intended, or any other to be committed, or with an Intent to commit a [c] Trespass, the Execution whereof causes a Felony to be committed, and continue together abetting one another till they have actually put their Design in Execution; and also all those who are [d] present when a Felony is committed, and abet the Doing of it, as by holding the [e] Party while another strikes him; or by [*] delivering a Weapon to him that strikes, or by moving [f] him to strike, are Principals in the highest [g] Degree, in Respect of such Abetment, as much as the Person who does the Fact, which in Judgment of Law is as [h] much the Act of them all, as if they had all actually done it; [i] and if there were Malice in the Abettor, and none in the Person who struck the Party, it will be Murder as to the Abettor, and Manslaughter only as to the other.

Sect. 8. It doth not seem necessary to the making an Abettor a Principal, that the Person on whom the Felony is committed shou'd be under any [k] Terror from the Abetment, and by Reason thereof discouraged from making that Defence which otherwise he might have made; but it seems to be sufficient for this Purpose, that the Person who does the Fact is encouraged and emboldened in it from the Hopes of present and immediate Assistance from the Abettor, whether he be within View of the Fact, or [l] not. And upon this Ground it hath been adjudged, [m] That where Persons combine together, to stand by one another in a Breach of the Peace, with a general Resolution to resist all Opposers, and in the Execution of their Design a Murder is committed, all of the Company are equally Principals, tho' at the Time of the Fact some of them were at such a Distance as to be out of View. Also upon the same Reason it hath been adjudged, [n] That where a Company of Rogues assault a Man in the Highway, who escapes from them, and then one of them rides from the rest, in the same Highway, and robs another out of the View of his Companions, and then returns to them, they are all of them equally Principals. And the like hath been [o] adjudged in Relation to all those who accompany one another with an Intent to commit a Burglary, in the Execution whereof some stand to watch only in the adjacent Places, and the rest actually break, and enter the House.

Sect. 9. But [p] where divers Persons accompany one another in the doing of a lawful Act, and one of them happens to kill a Man, he that gives the Wound is only guilty of the Homicide, and the rest of the Company shall neither be esteemed Principals nor Accessories. [q] Also if

[a] Pl. Com. 97.
[b] 11 H. 4. 13. pl. 30. Fitz. Coro. 86, 228. Bro. Appeal, 32. Moore 53. pl. 155. 9 Co. 67 b. Kely. 47. Pl. Com. 97, 98. 4 Co. 42.
See the Cases cited to the other Parts of this and the next Section.
And B. 1. ch. 31. Sect. 31. ch. 32 Sect. 5. and ch. 41. Sect. 6.
[c] B. 1. ch. 31. Sect. 46. H. P. C. 216, 217. Fitz. Coro. 60, 314, 350. 433. Bro. Coro. 172. Keil. 161. Kely. 47. Salk. 334, 335. S. P. C. 40. Lett. D. E.
[d] See B. 1. ch. 32. Sect. 6. Moor. 53. pl. 155. 2 Inst. 182. 3 Inst. 138. 59. Bro. Appeal, 19, 132. Bro. Coro. 19, 167, 188. S. P. C. 40. Lett. D. 44. Lett. B C. 41 Lett. B.

8. H. P. C. 215, 216. Fitz. Coro. 99, 309, 433. Dalt. ch. 108. Lamb. B. 2. ch. 7. fol. 283.
[e] H. P. C. 216. 7 H. 4. 27 pl. 4. *Presence holden not to be necessary foe this Purpose.* Fitz. Coro. 60. 4 H. 7. 18. pl. 10.
[f] Fitz. Coro. 135. S. P. C. 40. Lett. F. 13 H. 7. 10. pl. 7.
[*] H. P. C. 216. 2 Inst. 41, 82.
[g] H. P. C 40. Lett. D. H. P. C. 216. 4 H. 7. 18. pl. 10. Bro. Coro. 141. Bro. Appeal 85.
[h] Pl. Com. 98. Supra ch. 23. Sect. 76. ch. 25. Sect. 66. Fitz. Coro. 60. Bro. Coro. 141. Bro. Appeal 85. 4 H. 7. 18. pl. 10. 9 Co. 67. b.
[i] B. 1. ch. 31. Sect. 49 to Sect. 54.
[k] *But this seems required in* Pl. Com. 98. Salk. 334. 335. B 1. ch. 35. Sect. 7. ch. 38. Sect. 8.
[l] Fitz. Coro. 60. H. P. C. 216, 217. 4 H. 7. 18. pl. 10. Bro. Coro. 172. Salk. 334. 335. Keilw. 161. a. Fitz. Coro. 60, 314, 350, 433. S. P. C. 40. Lett. D. E. Vide Kely. 47.
[m] See B. 1. ch. 31. Sect. 46.
[n] B. 1. ch. 31. Sect. 7. Vide Moore 53. pl. 155. S. P. C. 40. Lett. D. E.
[o] B. 1. ch. 38. Sect. 8, 9. 11 H. 4. 13. 30. Vide Moore, 53. pl. 155.
[p] Keilw. 161. a.
[q] Kely. 47.

the Act intended tho' unlawful, were a bare Trespass, and one of the Company be guilty of Larceny, it is a Felony in such Offender only, because it is a Crime of a Nature entirely different from that intended, and not caused by the Execution of it.

Sect. 10. Also those who by accident are barely present when a Felony is committed, and are merely passive, and neither any Way encourage it, nor endeavour to hinder it, nor to apprehend the Offenders, shall [a] neither be adjudged Principals nor Accessaries; [b] yet if they be of full Age, they are highly punishable by Fine and Imprisonment for their Negligence, both in not endeavouring to [c] prevent the Felony, and in not endeavouring to [d] apprehend the Offender. And [e] if they any way shewed an Assent to the Felony, it seems, That they may be punished as Principals in it; because the shewing such an Assent cou'd not but give Encouragement to it.

Sect. 11. As to the third Particular, *viz.* Where those who are actually absent when a Felony is committed may be esteemed Principals in it: I take it to be a settled Rule, That where-ever a Man procures a Felony to be committed, and is absent at the Time when it is committed, and no other Person but himself can be adjudged a Principal in it, he shall be esteemed as much a Principal as if he had been present; for no one can be [f] punished as a Felon, but either as a Principal or as an Accessary; and therefore where the Procurer of a Felony cannot be punished as an Accessary, because there is no other to whom he can be an Accessary, he must be punished as a Principal, or not at all. And upon this Ground, it seems to be clear, That if a Man [g] persuade another to drink a Poisonous Liquor, under the Notion of a Medicine, who afterwards drinks it in his Absence; [h] or if *A.* intending to poison *B.* put Poison into a Thing, and deliver it to *C.* who knows nothing of the Matter, to be by him delivered to *B.* and *C.* innocently deliver it accordingly in the Absence of *A* or if one [i] incite a Madman to kill another, who afterwards kills him in the Absence of the Person that incited him; In all these, and the like Cases, the Procurer of the Felony is as much a Principal as if he had been present when it was done. And so [k] likewise all those seem to be who were present when the Poison was infused, and privy to, and consenting to the Design. But [l] those who only abetted their Crime by their Command, Counsel or Advice, but were absent when the Poison was infused, are Accessaries, and not Principals. Also if *A.* intending to poison *B.* deliver a poisonous Thing to *C.* to be by him delivered to *B.* and *C.* knowing it to be poisoned deliver it to *B.* in the absence of *A.* In this Case *C.* [m] only is a Principal in the Felony, and *A.* an Accessary.

Sect. 12. By force of 3 *H.* 7. 2. All those who are Accessaries before to the forcible taking away of a Woman, made Felony by that Statute, whether they were present or absent at the Time of the Taking, or Accessaries after, by wittingly receiving the Woman so taken away, shall be punished as [n] Principals; but this depends on the express Words of the Statute, and not on any Construction from the Reason of the Common Law.

[a] S. P. C. 40. Lett. D. E. H. P. C. 216. Fitz. Coro. 92, 197, 395. Bro. Indict. 5. 14 H. 7. 31. pl. 7. Cont. Fitz. Coro. 314, 197. Lamb. B. 2. ch. 7. f. 289. Vide supra. Ch. 23. Sect. 66.

[b] S. P. C. 40. Lett. E. Fitz. Coro. 395.

[c] Noy, 50. Dalt. Ch. 108.

[d] Supra, Ch. 12. Sect. 1, 2, 3, 4.

[e] Vide infra, Sect. 15.

[f] S. P. C. 40. Lett. D. E. H. P. C. 217. Fitz. Coro. 150. Dalt. ch. 108. Lamb. B. 2. ch. 7. f. 282. *My Pleas of the Crown*, B. 1. Ch. 20. Sect. 3. *But* Fitz. Coro. 92. *and* Crompt. 41. pl. 7. 8. *seems contrary.*

[g] 4 C. 44. b. Pult. 122. a.

[h] 4 Co. 44. b. 2 Inst. 183. Crompt. 44. pl. 43. H. P. C. 216. Pult. 122. a. Dalt. ch. 108.

[i] 9 Co. 81. 3 Inst. 138.

[k] H. P. C. 218. 9 Co. 81. Kely. 52, 53.

[l] See B. 1. ch. 1. S. 7.

[m] Kely. 52, 53.

[n] See B. 1. Ch. 42. Sect. 8, 9. and H. P. C. 216. [l] 4 Co. 44. b. Crompt. 44. pl. 43. C. 217.

Sect. 13. As to the fourth Particular, *viz.* Where a Man ſhall be adjudged a Principal in an Offence againſt a Statute: It ſeems to have been always [o] generally agreed, That notwithſtanding all penal Statutes are to be conſtrued ſtrictly; yet where-ever a Statute ordains, That thoſe who are guilty of the Thing prohibited by it, ſhall be adjudged Traitors or Felons, it by a neceſſary Implication makes all the Procurers and Abettors of it Principals or Acceſſories before, upon the ſame Circumſtances which will make them ſuch in a Treaſon or Felony at Common Law; becauſe ſuch Perſons may properly be ſaid to have done the Thing in ſuch a Manner cauſed by them, and conſequently to come within the very Words of the Statute. And therefore it ſeems to have been generally unqueſtionable, That thoſe who procure the [a] Clipping of the King's Coin, or other Offence, made High Treaſon by Statute, in ſuch a Manner as will make them principal Traitors in a Treaſon at Common Law, ſhall be adjudged principal Traitors by the Statute. And that thoſe who abet a [b] Petit Treaſon, or a Felony by Statute; as a [c] Rape, or [d] Buggery, *&c.* ſhall be adjudged Principals if preſent when it was committed, and Acceſſaries if abſent, in the ſame Manner as in Felonies at Common Law, unleſs the Statute expreſsly provide otherwiſe; as that of 3 *H.* 7. 2. does, as hath been ſhewn in the foregoing Section.

Sect. 14. But there [e] ſeem to have been formerly ſome Opinions, That the Receivers of a Felon by Statute, ſhall not be adjudged Acceſſaries to the Felony after the Fact, in the ſame Manner as the Receivers of a Felon at Common Law; becauſe ſuch Perſons can in no Propriety of Speech be ſaid to have done the Thing prohibited, as the Procurers of it may be ſaid to have done: But this [f] ſeems to have been more ſtrongly holden in Reſpect of thoſe Statutes which expreſsly provide that Acceſſories before to the Offence prohibited, ſhall be puniſhed as Felons, *&c.* but ſay nothing of Acceſſaries after; from which Words it may be argued, That they muſt be either intended to exclude Acceſſaries after the Fact, or have no mauner of Effect. Yet I take it to be ſettled at this Day, That in theſe, and all other Caſes, where a Statute makes any Offence [g] Treaſon or [h] Felony, it involves the Receiver of the Offender in the ſame Guilt with himſelf, in the ſame Manner as in Treaſon or Felony at Common Law, unleſs there be an expreſs Proviſion to the contrary. For ſince it is agreed, That ſuch new Treaſon or Felony ſhall have the ſame Conſtruction with a Treaſon or Felony at Common Law to all other [i] Intents and Purpoſes, Why ſhould it not alſo have the ſame in Relation to thoſe who are to be eſteemed Principals and Acceſſories in it? And as to the Objection, That the Receivers of the Offender cannot thereby be ſo properly ſaid to have done the Offence, as the Acceſſaries before, it may be anſwered, That they may properly enough be ſaid to be Partakers in the Guilt of the Offender; and what Crime ſuch a Partaking ſhall be adjudged to amount to, is moſt reaſonably determined by the Rules of Law in other Caſes of like Nature. And as to the Objection, That a Statute by expreſſing Acceſſaries before, muſt be intended to exclude Acceſſaries after, or to have no manner of Effect, it may be anſwered, That nothing is more common than for Statutes to expreſs thoſe Things which the Law would have implied, in which Caſes it ſeems a very reaſonable Conſtruction, That *Expreſſio eorum quæ tacite inſunt nihil operatur.*

[o] S. P. C. 44. Lett. A. B. C. 19 H. 6. 47. pl. 103. 3 Inſt. 45, 59, 72. B. 1 ch. 40. Sect. 4. Crompt. 42. pl. 83. Dalt. ch. 108. Lamb. B. 2. ch. 7. f. 286, 287. Daliſ. 11. pl. 12. 22. pl. 3. H. P. C. 215. *Quare* Dy. 88. pl. 105

[a] Daliſ. 11. pl. 12. H. P. C. 223, *in the Additions printed in the ſecond Edition*

[b] Vide ſupra, Sect. 2. B. 1. ch. 17. S. 55. 19 H. 7. 47. pl. 103. S. P. C. 3. Lett. A. H. P. C. 18.

[c] See B. 1 ch. 32. Sect. 5, 6.

[d] H. P. C. 187, 215. See B. 1. ch. 41. Sect. 6. S. P. C. 44. Lett. B. 11 H. 4. 13. Daliſ. 22. pl. 3. Fitz. Coro. 86, 228. Bro. Rape, 2, 3.

[e] 3 Inſt. 59 H. P. C. 215. See B. 1. ch. 38. Sect. 18.

[f] Vide S. P. C. 44. Lett C. and ſupra, Sect 3.

[g] Vide S. P. C. 44 Lett. C. Lamb. B 2. ch. 7. fol. 284, 285.

[h] Vide ſupra, Sect. 3. Bro. Treaſon, 19 S. P. C. 3. Lett A. 3 H. 7. 10. pl. 2. 1. ch. 40. S. 4.

[i] See B. 1 H. P. C. 215. Daliſ. 22. pl. 3. Lamb B 2. ch. 7. f. 284. 285. 3 Inſt. 45, 61, 72, 73. Supra, ch. 18. Sect. 12. S. P. C. 168 Lett. D. H. P. C. 230, 231.

Sect. 15. As to the fifth Particular *viz.* Whether the Offence of the Accessary can ever rise higher than that of the Principal: I take it to be an uncontroverted [a] Rule, That it never shall; it seeming incongruous and absurd that he who is punished only as a Partaker of the Guilt of another, shou'd be adjudged guilty of a higher Crime than the other. And therefore it seems clear, [b] That if a Wife or Servant cause a Stranger to murder the Husband or Master, and are absent when the Murder is committed, they cannot be said to be Accessaries to Petit Treason, but to Murder only, because the Offence of the Principal is but Murder. But if such Wife or Servant had been [c] present when the Murder was committed, they would have been guilty of Petit Treason, and the Stranger of Murder; because in Respect of such [d] Presence they would have been Principals in killing, as hath been more fully shewn *B.* 1, in the Chapter of *Petit Treason*, *Sect.* 6.

16. As to the second Point, *viz.* In what Cases a Man shall be adjudged an Accessary before: It seems to be [e] agreed, That those who by Hire, Command, Counsel or Conspiracy; and it seems to be generally [f] holden, That those who by shewing an express Liking, Approbation or Assent to another's felonious Design of committing a Felony, abet and encourage him to commit it, but are so far [g] absent when he actually commits it, that he could not be encouraged by the Hopes of any immediate Help or Assistance from them, are all of them Accessaries before the Fact, both to the Felony intended, and to all other Felonies which shall happen in and by the Execution of it, if they do not [h] expresly retract and countermand their Encouragement, before it is actually committed.

Sect. 17. But it doth not seem necessary in any Indictment or Appeal against a Man as Accessary before the Fact, to set forth the Special Manner by which he abetted it, but only to charge him [i] generally, *Quod Felonice, &c. abettavit, incitavit & procuravit, &c.* Also the like general Way of setting forth the Aid given to a Felon, seems to be sufficient both as to those who are * Principals, by being present when the Felony is committed, and also as to those who are † Accessaries after.

Sect. 18. It cannot be doubted, But that if a Man advise a Woman to kill her Child as soon as it shall be born, and she kill it in pursuance of such Advice, he is an [k] Accessary to the Murder, tho' at the Time of the Advice, the [l] Child not being born, no Murder cou'd be committed of it; for the Influence of the felonious Advice continuing till the Child was born, makes the Adviser as much a Felon as if he had given his Advice after the Birth. Also it seem [m] agreed, That if I command another to beat a Man, and he beat him in such a Manner that he dies thereof, I am an Accessary before to the Felony; [n] because it happened in the Execution of a Command, which naturally tended to endanger the Life of the other. And [o] *a fortiori* therefore it follows, That if a Man commands another to rob a Man, and he in robbing him kill him; or to burn the House of *J. S.* and he by burning it, burn also the House of *J. N.* the Commander is as much an Accessary to the subsequent Felony, as to that which was directly commanded. Also it is said, [p] That if I command

[a] 3 Inst. 20, 139. H. P. C. 215. Bro. Coro. 119. Vide Kelw. 34. pl. 9 and Inst. S. 21. 22.
[b] 3 Inst. 20. Dalt. 16. pl. 11. Dyer, 254, pl. 103, 332, pl. 25. 128 pl. 57. H. P. C. 24, 25, 215. Crompt. 19. pl. 8. Bro. Coro. 119. *But* 40 Ass 25. *whereof this Note in* Brook *is an Abridgment, seems contrary. See also* Fitz. Coro. 216. *which is an Abridgment of the same Case*
[c] 3 Inst. 20. H. P. C. 24, 25. Dy 128, pl. 57. 254, pl. 103 332. pl. 25. Crompt. 19. pl. 8. Moore 91. pl. 227. Dalt. 16. pl. 11.
[d] Vide supra Sect. 7.
[e] 2 Inst. 182. Dalt. Ch. 108. Lamb. B. 2. ch. 7. S. P. C. 40. Lett. D. Crompt. 41. pl. 1, 7, 8. H. P. C. 217.
[f] 2 Inst. 182. Dalt. ch. 108. Lamb B. 2. ch. 7. f. 286. H P. C. 217. Pl. Com. 475. b. Cont Cromp. 41. pl. 7, 8.
[g] Vide supra, Sect. 7, 8. S. P. C. 40. Lett. D E. &c. Bro. Appeal 19. Bro. Coro. 188. [h] 3 Inst. 51. Crompt. 42. pl. 16. H. P. C. 217, 218. Lamb. B. 2 ch. 7. f. 289. Dalt. ch. 108. Pl. Com. 475, a. 476 b. [i] Coke's Ent. 56, pl. 5. 57. pl. 6. Ra. Ent 51. pl. 6. Fitz. Coro 433 *seems somewhat contrary.* * 4 Co. 41. Cok. Ent, 57. pl. 6. † Cok. Ent 56. pl 5. Ra. Ent. 48. pl. 4. 52 pl. 15. [k] Dyer 186 3 Inst. 51. Dalt. ch. 108. Lamb B. 2. ch. 7. f. 286 Crompt. 41. pl. 2. [l] See B. 1. ch. 31. Sect 16, 17. [m] H. P. C. 217. Pl. Com. 475 b. Lamb. B. 2. ch 7. fol. 386 Pl. Com. 475. [n] S. P. C. 41. Lett. D. Fitz. Coro. 314. Vide Pl. Com. 475 b. Dalt. ch. 108. Cromp. 43. pl. 35. [o] Pl. Com 475. b. [p] Pl. Com 475 a b. Dalt. ch. 108. Lamb B. 2. ch. 7. f 286. Crompt. 42. pl 34, 35.

a Man to rob another, and he kill him in the Attempt, but do not rob him, I am guilty of the Murder, becauſe it was the direct and immediate Effect of an Act done in Execution of my Command to commit a Felony. But if I perſuade *A.* to poiſon *B.* and *A.* accordingly give Poiſon to *B.* who eats Part of it, and gives the reſt to *C.* who is killed by it, I am guilty of a great Miſdemeanor only in Reſpect of C. but not [a] an Acceſſary to his Murder, becauſe it was not the direct and immediate Effect of the Act done in purſuance of my Command, but happened accidentally thro' the Act of *B.* to which I being no way Privy, cannot be made Acceſſory by Reaſon of it. Yet in this Caſe *A.* is certainly guilty of the Murder of *C.* as hath been more fully ſhewn, *Book* 1. *Chap.* 31. *Sect.* 42, 43.

[a] Pl. Com. 474, 475. Dalton ch. 108. Lambart, B. 2. ch. 7. f. 288 Crompt. 42. pl. 10.

Sect. 19. It ſeems to be holden generally in ſome * Books, That whereever a Felony enſues, and follows upon any unlawful Act commanded by another, and executed in the ſame Manner as it was commanded, the Commander is an Acceſſary to the Felony. But this [b] ſeems to be too large a Rule and liable to great Difficulties, unleſs limited by ſome Diſtinctions; but finding little in the Books concerning this Matter, I ſhall leave it to be farther conſidered by others.

* Plow. Com. 475 a. Moore 487. Dalt. ch 108. 3 Inſt. 51 [b] S P. C. 41. Letter D. Fitz. Coro. 314. Dalt. ch. 108. Moore 53. pl. 155.

Sect. 20. It ſeems to be [c] agreed, That if the Felony committed be the ſame in Subſtance with that which was intended, and variant only in ſome Circumſtance, as in Reſpect of the Time or Place, at which, or the Mean whereby it was effected, the Abettor of the Intent is altogether as much an Acceſſary as if there had been no Variance at all between it and the Execution of it; as where a Man adviſes another to kill ſuch a one in the Night, and he kills him in the Day, or to kill him in the Fields, and he kills him in the Town, or to poiſon him, and he ſtabs or ſhoots him.

[c] Pl. Com. 475 b. H. P. C. 217. Lamb. B 2. ch 7. f. 287. 3 Inſt. 51. Crompt. 42. pl. 14 Dalt. ch. 108.

Sect. 21. But if a Man command another to commit a Felony on a particular Perſon or Thing, and he do it on [d] another; as to kill *A.* and he kill *B.* or to burn the Houſe of *A.* and he burn the Houſe of *B.* or to ſteal an Ox, and he ſteal an Horſe; or to ſteal ſuch an Horſe, and he ſteal another; or to commit a Felony of one kind, and he commit another [e] of a quite different Nature; as to rob *J. S.* of his Plate as he is going to Market, and he break open his Houſe in the Night, and there ſteal the Plate; it is ſaid, That the Commander is not an Acceſſary, becauſe the Act done varies in Subſtance from that which was commanded.

[d] H. P. C. 217. Pl. Com. 475. Dalt. ch. 108. Lamb. B. 2 ch. 7. f. 287. Crompt. 42. pl. 11. [e] Pl Com. 475. 3 Inſt. 51. Dalt. ch. 108

Sect. 22. But it is obſervable, That [f] *Plowden*, in his Report of *Saunders*'s Caſe, which ſeems to be the chief Foundation of what is ſaid by others concerning theſe Points, in putting the Caſe of a Command to burn the Houſe of *A.* which ſhall not make the Commander an Acceſſary to the burning the Houſe of *B.* unleſs it were cauſed by burning that of *A.* ſtates it in this [g] Manner, *If I command a Man to burn the Houſe of ſuch an one, which he well knows, and he burn the Houſe of another, there I ſhall not be Acceſſary, becauſe it is another diſtinct Thing, to which I did not give Aſſent*, &c. By which it ſeems to be implied, That it is a neceſſary Ingredient in ſuch a Caſe to make *B.* no Acceſſary, that he knew the Houſe which he was commanded to burn; for if he did not know it, but miſtook another for it, and intending only to burn the Houſe which he was commanded to burn, happen by ſuch Miſtake to burn the other, it may probably be argued, That the Commander ought to be eſteemed an Acceſſory to ſuch Burning, becauſe it was the direct and immediate Effect

[f] Lambard, B. 2. ch. 7. fol. 287, 288. Crompt. 42. pl. 11. [g] Pl. Com. 475. b. *But this Caſe is not ſtated in this Manner, either by* Lambard, Dalton *or* Crompton, *See* Lamb. B. 2 ch. 7. fol. 287. Dalt. ch. 108. Crompt. 42. pl. 36.

Effect of an Act wholly influenced by his Command, and intended to have pursued it.

Sect. 23. It seems to be generally agreed, [a] That he who barely conceals a Felony, which he knows to be intended, is guilty only of a Misprision [b] of Felony, and shall not be adjudged an Accessary.

Sect. 24. It seems to be certain, That no one can be any [c] way punished as an Accessary to Homicide *per infortunium*, or *se defendendo*, because they are not Felonies; from whence it follows, That if he who is indicted or appealed, as a Principal in Murder, be found guilty of such Homicide only, those who are only charged as his Accessaries before or after, shall be discharged. [d] And so also shall those who are charged only as Accessaries before, where the Principal is found guily of Manslaughter; because that necessarily supposes the Fact to have happened on a sudden; for if it had been done upon Premeditation, it wou'd have been Murder. And *Quære*, If they who are charged as Accessaries [e] after, should not also be discharged at Commom Law where the Principal was found guilty of Manslaughter, and admitted to the Benefit of his Clergy, because in such Case it could not appear by any Judgment that there was a Principal; but the Law in this Respect seems to be altered by 1 *Annæ* 9. set forth more at large in the following Part of this Chapter, which makes a Conviction equivalent as to this Purpose to an Attainder.

Sect. 25. Before the Statute of 11 & 12 *W.* 3. Accessaries to Piracy were not within the Purview of 28 *H.* 8. by which Piracy is triable according to the Course of the Common Law; but for this I shall refer the Reader to *B.* 1. *Ch.* 37.

As to the third Point, *viz.* In what Cases a Man shall be adjudged an Accessary after: I shall endeavour to shew,

1. What Kind of Receipt of a Felon will make the Receiver such an Accessary.
2. Whether it be necessary that such Receiver know of the Felony.
3. Where the Receivers of a Felon shall be excused in Respect of the Relation they bear to him.
4. How far the Felony must be complete at the Time of the Receipt, to make the Receiver an Accessary.

Sect. 26. As to the first Particular, *viz.* What kind of Receipt of a Felon will make the Receiver an Accessary after the Fact: It seems agreed, [f] That generally any Assistance whatsoever given to one known to be a Felon, in order to hinder his being apprehended or tried, or suffering the Punishment to which he is condemned, is a sufficient Receipt for this Purpose; as where one assists him with a [g] Horse to ride away with, or with Money or Victuals to support him in his Escape; or where one harbours and [h] conceals in his House a Felon under Pursuit by Reason whereof the Pursuers cannot find him; and much more, where one harbours in his House and openly [i] protects such a Felon, by Reason whereof the Pursuers dare not take him.

[a] Lamb. B. 2. ch. 8. f. 289. Moore 8. pl. 29.
[b] S. P. C. 37. Letter C. H. P. C. 129, 219. 3 Inst. 139, 140. 2 Inst. 183. *But this is made a Quære by* Dalton, *ch.* 108.
[c] See B. 1. ch. 59.
[d] Fitz. Coro. 116, 172. Bro. Coro. 33, 80. 15 Ass. pl. 7. 11 H. 4. 93. pl. 53. Crompt. 43. pl. 38. Bro. Forfeiture, 13.
[e] 4 Co. 43, 44. H. P. C. 217. Moore 461, pl. 645. Cro. El. 540. pl. 4. Crompt. 43. pl. 40. Dalt. ch. 108. See B. 1. ch. 30. Vide Crom. Just. 44. pl. 41. 3 Inst. 55. Moore 461, pl. 645. Cro. El. 540. pl. 4.
[f] 2 Inst. 183. S. P. C. 41. Letter E. Dalt. ch. 108. Lamb. B. 2. ch. 7. f. 289, &c. H. P. C. 218. Dalt. ch. 108. Crompt. 43. pl. 39.
[g] H. P. C. 218. Dalt. ch. 108. Crompt. 43. pl. 39.
[h] Dalt. ch. 108. Fitz. Coro. 427. Lamb. B. 2. ch. 7. f. 291. S. P. C. 43. Letter C. Crompt. 42. pl. 20.
[i] 26 Ass. pl. 47. *Adjudged* Bro. Coro. 130. Fitz. Coro. 195.

Sect. 27. Alſo I take it to be ſettled at this Day, That whoever [a] reſcues a Felon from an Arreſt from the Felony, or voluntarily [b] ſuffers him to eſcape, is an Acceſſary to the Felony: [c] Alſo ſome have ſaid, That all thoſe are in like Manner guilty who oppoſe the apprehending of a Felon; but for theſe Matters I ſhall refer the Reader to the former Part of this Book, wherein they are more fully handled.

Sect. 28. It ſeems to be holden both by [d] *Brook* and [e] *Staundforde*, That the bare receiving into one's Houſe a Perſon known to be a Felon, is ſufficient without any farther Circumſtances to make a Man an Acceſſary to the Felony: And this ſeems to be favoured by the *Year-Books* of [f] 25 *E.* 3. and [g] 7 *H.* 6. Alſo it ſeems to be holden both by [h] *Staundforde* and [i] *Dalton*, That not only ſuch a Receipt of ſuch a Felon into one's Houſe, but any other Favour or Aid voluntarily afforded him, as by relieving him with Money, Meat or Drink, is ſufficient for this Purpoſe. But it is obſervable, That the Caſe in the Book of [l] *Aſſiſes*, whereon *Dalton* ſeems chiefly to ground his Opinion, and which is more accurate than any other *Year-Book* I meet with on this Subject, is of one who was indicted *for having received a Felon, and for that no one by Reaſon of him dared to take him:* Whereupon it is ſaid by *Shard*, *If one receive a Felon in Favour and Aid of the Felony, I hold ſuch a one an Acceſſary to the Felony.* Alſo it is farther obſervable, That the *Year-Book* of [m] 9 *H.* 4 on which the above-mentioned Opinion of *Brook* ſeems to be grounded, ſeems to prove only that every Receiver of a Felon, knowing him to be ſuch, is indictable, but not that he is indictable for Felony; and the chief Purport of the Caſe is to ſhew, That one who having a Felon in his Houſe, voluntarily ſuffers him to go at Large, is not guilty of a felonious Eſcape, unleſs he had arreſted him. To which may be added, That [n] *Lambard* doth not ſay generally, That all thoſe who receive a Felon, knowing him to be ſuch, are Acceſſaries after; but all thoſe who feloniouſly, and with an evil Mind, receive a Felon, *&c.* And Sir *Edward Coke*, in his [o] *Second Inſtitute*, deſcribes ſuch Acceſſaries, as thoſe who knowing a Felony receive the Felon, and not only conceal his Offence, but favour and aid him, that he be not known. And in his [p] *Third Inſtitute* he ſaith, If one receive a Thief, and aid and maintain him in his Felony, he is an Acceſſary; by which Expreſſions it ſeems to be implied, That there ought to be ſome other Circumſtance beſides that of the bare ſuffering of a Perſon known to be a Felon to be in one's Houſe, to make a Man an Acceſſary.

Sect. 29. However it ſeems to be [q] agreed, That no one ſhall be adjudged an Acceſſary to a Felony for receiving into his Houſe a Perſon under Bail for ſuch Crime, or for relieving with Money or Victuals a Perſon ſo bailed, or in Priſon; and the Reaſon given by [r] *Dalton* is, becauſe the Felony cannot be concealed, nor the Trial hindred by it. And if this be a ſufficient Reaſon, Why may not any other Receipt or Relief of a Felon, whereby the Felony is not concealed, nor the Trial, *&c.* hindred, come under the like Rule? As it ſeems [s] agreed That the ſending a Letter to procure the Deliverance of a Felon, or the inſtructing him to [t] read, in order to entitle him to the Benefit of the Clergy, ſhall do; and even the [u] adviſing his Friends to perſuade Witneſſes not to come againſt him at

[a] Supra ch. 21. Sect. 7, 8. Fitz. Coro. 158, 433. H. p. C. 116. Cont. Fitz. Coro. 48. S. P. C. 43. Lett. D. Dalt. ch. 108. 1 H. 7. 6. pl. 2. Bro. Coro. 130.
[b] Supra. ch. 19. Sect. 10, 22, 26.
[c] Supra, Sect. 10. and Ch. 17. Sect. 1.
[d] Bro. Eſcape 43.
[e] S P. C. 41. Lett. E.
[f] 25 E. 3. 39. pl. 2. *Abridged* Fitz. Coro. 126.
[g] 7 H. 6. 42. pl. 18. *Abridged* Bro. Indictm. 4. Fitz. Indict. 11.
[h] S. P. C. 41. Lett. E.
[i] Dalt. ch. 108. *See alſo* Crom. 42 pl. 25.
[l] 26 Aſſ. pl. 47. *Abridged* Bro. Coro. 103. Fitz. Coro. 195.
[m] 9 H. 4. 1. pl. 3. *Abridged* Fitz. Coro. 76. Bro. Coro 26. Bro. Eſcape. 43.
[n] Lamb. B. 2. ch. 7. f. 289.
[o] Page 183.
[p] Page 134.
[q] H. P. C. 218. Dalton ch. 108. Crompt. 42. pl. pl. 25.
[r] Dalt. ch. 108. Crompt. 42. pl. 25 *and* Lamb. B. 2. fol. 209. *are to the ſame purpoſe.*
[s] 26 Aſſ. pl. 47. Bro. Coro. 103. Fitz. Coro. 195. S. P. C. 41. Lett. E. H. P. C. 219.
[t] 3 Inſt. 139. H. P. C. 219.
[u] 3 Inſt. 139. H. P. C. 219.

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his Trial; and also the [a] labouring of Witnesses in pursuance of such Advice. And yet the two last of these Practices are certainly very highly criminal; and tho' they do not tend totally to prevent the Trial, yet are the most likely Means to make it fruitless and ineffectual. Also it seems to be agreed, That the suffering a Felon to escape [b] without arresting him, [c] or the bare Concealment of a Felony, tho' they are Crimes of a very high Nature, do not make a Man an Accessary.

[a] 3 Inst. 139.

[b] H. P. C. 219.

[c] Supra, Sect. 10. and 27. Moore 8. pl. 29.

Sect. 30. Also I take it to have been generally agreed, before the Statute of 3 & 4. *W.* & *M.* 9. That neither the receiving of [d] other Mens Goods, known to have been stolen, nor the taking of one's * own Goods again, from one that had stolen them, on an Agreement not to prosecute him, nor the taking of any other [e] Reward on such an Agreement, did make a Man an Accessary to the Felony, unless he also had received the Thief. But now it is enacted by that Statute, *That if any Person or Persons shall buy or receive any Goods or Chattel that shall be feloniously taken or stolen from any other Person, knowing the same to be stolen, he or they shall be taken and deemed an Accessary, or Accessaries, to such Felony, after the Fact, and shall incur the same Punishment as an Accessary or Accessaries to the Felony, after the Felony committed.* And it is farther enacted by 1 *Annæ* 9. That such Persons may be prosecuted for a Misdemeanor, before the Principal shall be convicted, as shall be shewn more at large in the following Part of this Chapter.

[d] Supra, Sect. 10. and 27. *B.* 1 ch. 59. [d] Aleyn. 57. Style, 91. Cro El. 888. pl. 1. Yelv. 4, 5. Lamb. B. 2. ch 7. f. 290, 291. 1 Rol. Abr. 68. pl. 29. H. P. C. 218. 25 E. 3. 39. pl. 2 *Abridged* Fitz. Coro 126. 27 Ass. 69. *Abridged* Fitz. Coro 208. Bro. Coro. 114 Cont. Cromp. 42, pl. 3. 43. pl. 37, 39. *It is made a Quære*, Crom. 42. pl 17. *and* S. P. C. 43 Lett. C. * H. P. C. 130.

Sect. 31. It doth not seem to be settled, [f] Whether the Receipt of a Felon, who is pardoned by the King, but still liable to an Appeal, may not make the Receiver an Accessary.

[f] Dalt. ch 108. Moore 8. pl. 29. Crompt. 41. pl. 5. 42 pl. 23. Lamb B. 2. Ch. 7. fol. 290. 1 Rol. Ab. 67. pl. 27. Cro. El. 486. pl. 3. Vide Noy 90.

Sect. 32. As to the second Particular, *viz.* Whether it be necessary that a Man know of the Felony, in order to make him an Accessary by receiving the Felon: There can be no Doubt but that it is necessary that such Receiver have [g] Notice of the Felony either express or implied; and therefore it is the settled Form of all [h] Indictments and Appeals [i] against Accessaries after the Fact, expressly to charge them with having known that the Person received by them, had committed the Principal Felony.

[g] H. P. C. 130. 3 Inst. 134, 138. B. 1. ch. 59. *It is made a Quære*, More, 8. pl. 29. *and* Dalt. ch 108. [h] Vide Pl. Com. 476. Dalt. ch. 108. [i] S. P. C. 41. Lett. E H. P. C. 218. [h] 7 H. 6. 42. pl. 18. *Abridged* Bro. Indictm. 4. 3 H 7. 10. pl. 2. Bro. Coro. 150. Fitz. Cor. 55, 285, 429. 22 Ass. pl. 55. H. P. C. 218. [i] Ra. Ent. 43, b. 54 pl. 3, 4. 51. pl. 15. Coke's Ent. 56, pl. 5. 57. pl. 6. [k] S. P. C. 41. Lett. E. 96. Lett. G. Crompt. 43 pl. 28, 31, 32. H. P. C. 218. Dyer, 355. pl. 36. Fitz. Coro. 377. Dalt. ch. 108. *Quære* 7 H. 6. 42. b. 43. a. [l] Co. Litt. 391. a. [m] S. P. C. 41. Letter E. Dalt. ch. 108. Lamb. B. 2. ch 7. f. 293. H. P. C. 218.

Sect. 33. But it is not clearly settled, Whether in some Cases an implied Notice of the Felony be not sufficient for this Purpose? As where a Man receives a Person attainted of Felony, in the same County wherein he is attainted, in which Case it hath been [k] holden, That he is an Accessary to the Felony, whether he had actually Notice of the Attainder or not; because it appears by Matter of Record in the same County, whereof every Man is said to be conusant. But to this it may be answered, That Felony implies in it something of Wilfulness and Baseness; something [l] *felleo animo perpetratum*; and that it wou'd be extremely hard, by such a forced way of Reasoning, to presume a Man guilty of it, who probably may be entirely innocent: And to this Opinion the greater Number of [m] Authorities seem to incline.

[k] S. P. C. 41. Lett. E. 96. Lett. G. Crompt. 43 pl. 28, 31, 32. H. P. C. 218. Dyer, 355. pl. 36. Fitz. Coro. 377. Dalt. ch. 108. *Quære* 7 H. 6. 42. b. 43. a. [l] Co. Litt. 391. a. [m] S. P. C. 41. Letter E. Dalt. ch. 108. Lamb. B. 2. ch 7. f. 293. H. P. C. 218.

Sect. 34. As to the third Particular, *viz.* Where the Receivers of a Felon ſhall be excuſed in Reſpect of the Relation they bear to him: It ſeems agreed,[a] That the Law hath ſuch a Regard to that Duty, Love, and Tenderneſs, which a Wife owes to her Husband, as not to make her an Acceſſary to Felony by any Receipt whatſoever given to her Husband; yet if ſhe be any way guilty of [b] procuring her Husband to commit it, it ſeems to make her an Acceſſary before the Fact in the ſame Manner as if ſhe had been Sole. Alſo it ſeems agreed, That no other Relation beſides that of a Wife to her Husband, will exempt the Receiver of a Felon from being an [c] Acceſſary to the Felony; from whence it follows, That if a Maſter receive a Servant, or a Servant a Maſter, or a Brother a Brother, or even a Husband a Wife: they are Acceſſaries in the ſame Manner as if they had been mere Strangers to one another.

Sect. 35. As to the fourth Particular, *viz.* How far the Felony muſt be complete at the Time of the Receipt, to make the Receiver an Acceſſary: It ſeems to be clearly agreed, [d] That a Man ſhall never be conſtrued an Acceſſary to a Felony, in Reſpect of the Receipt of an Offender, who at the Time of the Receipt was not a Felon, but afterwards becomes ſuch by Matter ſubſequent; as where one receives another who has wounded a Perſon dangerouſly, that happens to die after ſuch Receipt; for tho' the Offender be for ſpecial Reaſons adjudged to ſome Purpoſes guilty of Homicide *ab initio*, yet he ſhall not be ſo eſteemed in Reſpect of any others but himſelf; for Fictions of Law ſhall never be carried farther than the Reaſons which introduce them neceſſarily require.

Having thus ſhewn who are to be eſteemed Principals, and who Acceſſaries; I am now to ſhew in what Manner they are to be arraigned, and ſhall endeavour to ſhew,

1. How far it is neceſſary that the Principal be actually attainted or convicted before the Acceſſary ſhall be proceeded againſt.

2. Whether the Acceſſary ſhall in any Caſe be arraigned or tried before any Principal hath appeared.

3. Whether a Perſon charged as Acceſſary to more than one, may be tried before all the Principals have appeared.

4. Whether the Principal and Acceſſary may be both tried by the ſame Inqueſt, and in what Manner they have are to be tried.

5. In what Manner the Acceſſary ſhall be tried, where his Offence ariſes in a different County from that of the Principal.

Sect. 36. As to the firſt Point, *viz.* How far it is neceſſary that the Principal be actually attainted [f] or convicted before the Acceſſary ſhall be proceeded againſt: It ſeems clear, That whatſoever the Nature of the Felony be, if the Principal be in ſuch Manner [g] acquitted of it, [h] whether at the Suit of the King, or of the Party, that he may plead ſuch Acquittal in [i] Bar of any ſubſequent Proſecution for the ſame Felony, the Acceſſary ſhall not be arraigned, but ſhall be diſcharged, according to the Rule, *Ubi factum* [k] *nullum, ibi fortia nulla.*

[a] Lamb. B. 2 ch. 9. Bract. B. 3. ch. 32 S. 9. Dalt. ch. 108. H. P. C. 219. Crompt. 42 Sect. 22. S. P. C. 26. *See* B. 1. ch. 1. Sect. 9, 10.

[b] Bract Lib. 3. ca. 32. Sect. 9, 10. Dalt. ch. 108. *See* B. 1. ch. 1. Sect 11, 12. Fitz. Coro. 383.

[c] Dalt. ch. 108. Crompt. 42. Sect. 22. H. P. C. 219. S. P. C. 26. Lett. C.

[d] 21 H. 7. 34. pl. 34. *See* Bro. Coro. 62. H. P. C. 219 Crompt. 42. pl. 15. Dalt ch. 108. Lamb. B 2. ch. 7.

[e] Supra ch. 18. Sect. 13. ch. 19 S. 25.

[f] Vide 9 Aſſ. pl. 5. Bract. 128. pl. 13, 14. *and the Notes to the fourth of theſe Points.*

[g] Fitz. Aſſ. 291. Conſpiracy, 4. H P. C. 221. S. P. C. 47.

Lett. F. 48. Lett. A. Supra, ch. 23. Sect. 140. Fitz. Coro. 222. 33 H. 6. 1. pl. 6. 29 Aſſ pl. 59. Ra. Ent. 57. pl 6. Raym. 477. Fitz. Office de Court, 23. [h] Fitz. Coro. 277. [i] Vide ſupra. ch. 23. Sect. 140. [k] 4 Co. 43. b. S. P. C. 47. Lett. F.

Sect.

Sect. 37. How far the Accessary shall be discharged upon the Principal's being found guilty of Manslaughter, *&c.* hath been already shewn *Section*, 24.

Sect. 38. It is certain that the Exigent shall not be awarded against the Accessary before the Principal is attainted, as hath been more fully shewn, *Ch.* 27. *Sect.* 128, *&c.*

Sect. 39. It seems also to be clear, That where the Law requires the Attainder or Conviction of the Principal before the Accessary shall be convicted, it requires that such Attainder and Conviction of the Principal be on the [a] same Suit, and for the same Crime, of which the Accessary is to be convicted; for it is agreed, That an Attainder of the Principal at the Suit of the [b] King no way helps the Proceedings against the Accessary at the Suit of the Party, and *sic e converso:* Also it seems to be agreed, That the Attainder of the Principal of one Felony is no way [c] material as to the Proceedings against the Accessary for another.

Sect. 40. But where the Principal is actually attainted, tho' erroneously, of the same Felony with which the Accessary is charged, it seems [d] agreed, That such Attainder, while it stands unreversed, is as sufficient for this Purpose as it would have been if there had been no Error in it. Yet it seems [e] certain, That if the Principal be attainted, and then the Accessary, the Reversal of the Attainder of the Principal, *ipso facto* reverses the Attainder of the Accessary; and that the Heir may have an Assise of *Mortdancester* against the Lord of the Fee, having entred into the Lands of such an Accessary, as having escheated to him by Reason of the Attainder.

Sect. 41. It seems to have been in a great Measure settled [f] before the Statute of 1 *Annæ* 9. notwithstanding the great Variety of Opinions in the *Old Books* concerning this Matter, That where-ever the Attainder of the Principal was prevented by his [g] Death, or [h] standing Mute, or challenging [i] peremptorily above the Number allowed him by Law, or being admitted [k] to the Benefit of the Clergy, or [l] pardoned, whether before or after his Conviction, the Accessary should not be arraigned

Sect. 42. But it seems to have been generally always agreed, [m] That after the Principal is actually attainted, whether after a Conviction by Verdict, or by [n] Outlawry, *&c.* his Death or Pardon, *&c.* subsequent, will no way avail the Accessary.

[a] Bro App. 19.
[b] 2 Inst. 184. Plowd. 98, b. 99. a. H P. C. 221. S P. C. 47. Lett. A. Bro.Coro. 19. 7 H. 4. 27. Vide Dyer, 133. pl. 4.
[c] 40 Ass. pl. 25 H. P. C. 221. 22 Ass. pl. 40.
[d] Fitz. Coro. 58. 2 R. 3. 21, b. 22. a. H. P. C. 222, 223. 2 Inst. 184. Crompt. 43. pl. 29. Bro. Coro. 164 *or* 5. 174 *or* 5. S. P. C. 47. Lett. D 7 H. 4. 16. pl. 5. 9 Co. 68. b. 119
[e] H.P. C. 184.
[f] 270. Bro. Coro. 18 E 4. 9. pl. 16.

Cromton's Justice, 41. pl. 9. 1 Rol. Ab. 777. pl 10. 9 Co. 119 b. Fitz Mordancester, 46. [f] *See the Preamble of* 1 Annæ, 9. [g] Bro. Appeal, 19. Coro. 86 7 H. 4. 27. pl. 4. Fitz Coro 378. Conspiracy, 4. Responder, 35. F. N. B. 115. Lett. F. H.P.C. 221. 44 E. 3. 7. pl. 6. 33 H. 6. 1, 2 pl. 6. 21 H 7. 31. pl. 15. 22 Ass. pl. 40. [h] H. P. C. 221. 2 Inst 184 Cont. Fitz Coro. 58 *this is made a Quære* S. P. C. 47. Lett. C. [i] *See the Statute of* 1 Annæ 9. *But this is made a Quære* S. P. C. 47. Letter C. Fitz Coro. 51. 3 H. 7. 12 pl. 5, 8. [k] Cro El. 541. 4 Co. 43, b, 44 a. H. P. C. 221. 3 Inst. 114, 139. 3 H. 7. 1. pl. 3. Cro. Ca. 566, 567. Crompton's Justice, 43, pl. 26, 44. pl. 42. Raym. 477. Fitz. Coro. 145, 176, 193, 252, 376, 450. Bro. Coro. 18, 70, 71, 83, 84, 101, 131 *or* 132, 137 *or* 138. 18 Ass. pl. 13. 26 Ass. pl. 27. 5 Assise, pl. 5. 7 H. 4. 16. pl. 5. Bro. Clergy, 15. Cont. Fitz. Coro. 58, 53, 270, 466. Crompton's Justice, 42. pl. 26. 10 H. 4, 5 pl. 17. Bro. Coro. 157 *or* 158. *Quære* 3 H. 7. 12. pl. 10. S. P. C. 47. H. 48. A. [l] H. P. C. 221. F. N B. 115. Lett. F. Cro. El. 541. Fitz Coro. 53. Fitz Conspiracy, 4. 33 H. 6. 1. pl. 6. Bro. Coro. 18. 4 Co 43, b 44 a. 3 Inst. 139. Cromp. Justice, 44. pl. 42. 3 H. 7. 12. pl. 10. 7 H. 4. 16. pl 5. Raym. 477. *This is made a Quære*, Crompton's Justice, 42. pl. 26. and S. P. C. 47. G. Cont. Fitz. Coro. 151, 260. Bro. Coro. 70. 3 Assise, pl. 14. Vide Dyer, 88. pl. 105. [m] Cro. Eliz. 541. 4 Co. 43, b. 44. a. H. P. C. 221. Raym. 477. Cont. Fitz Cor. 450. [n] 4 Co. 43. b. Dy. 120. pl. 10. Fitz. Coro. 58, 93. 40 Assise pl. 8. 43 E. 3. 17. pl. 21. 3 H. 7. 1. pl. 3 9 H. 4. 8, b. 9 a. Bro. Coro. 164 *or* 5. 174 *or* 5. Bro. Mainprise, 58. Cont. *as to Abjuration*,, 7. H 4 16. pl. 5. Bro. Coro. 18.

Sect. 43. And it is enacted by the said Statute of 1 *Annæ* 9. Par. 1. *That if any principal Offender shall be convicted of any Felony, or shall stand Mute, or shall peremptorily challenge above the Number of twenty Persons, returned to serve on the Jury, it shall and may be lawful to proceed against any Accessary, either before or after the Fact, in the same Manner as if such principal Felon had been attainted thereof, notwithstanding any such principal Felon shall be admitted to the Benefit of his Clergy, pardoned, or otherwise delivered before his Attainder; and such Accessary shall suffer the same Punishment, if he or she shall be convicted, or shall stand Mute, or peremptorily challenge above the Number of twenty Persons returned to serve on the Jury, as he or she should have suffered if the Principal had been attainted.*

Sect. 44. And it is recited by the same Statute, *Par.* 2. *That the Buyers and Receivers of stolen Goods had oftentimes conveyed away and concealed the Principal Felons, so that they could not be convicted of such principal Felony, and thereby such Buyers and Receivers had escaped all Manner of Punishment, which had greatly encouraged the Buying and Receiving of such stolen Goods*; and thereupon it is enacted, *That it shall and may be lawful to prosecute and punish every such Person or Persons buying or receiving any stolen Goods, knowing the same to be stolen, as for a Misdemeanor, to be punished by Fine and Imprisonment, altho' the principal Felon be not convicted before of the said Felony, which shall exempt the Offender from being punished as Accessary, if the Principal shall be afterwards convicted.*

Sect. 45. As to the second Point, *viz.* Whether the Accessary shall in any Case be arraigned or tried before any Principal hath appeared: Notwithstanding the numerous [a] Authorities in the Old Books, that an Accessary shall not be compelled to answer before the Principal have appeared and answered, I take the contrary Opinion to be in a great Measure [b] settled at this Day. And yet it seems to have been always agreed, [c] That his Plea cannot be tried before such Appearance or Attainder, [d] unless he desire it himself; in which Case it is agreed, That he may be tried without the Principal, according to the Rule that *Quilibet potest renunciare juri pro se introducto.*

[a] Bro. Coro. 11, 20, 118. 9 H. 7. 19 pl. 14 Bract. 128 pl. 11. 139, pl. 11. 142, pl. 8. 148. pl. 4 Fitz. Responder, 35, 36. Coro. 33, 82, 90, 135, 135, 216, 350. Trespass 199. 44 E. 3. 38, pl. 35. 9 E. 4. 48. pl. 1. 40 E. 3. 42. pl. 22. 44 E. 3. 7 pl. 6. 25 E. 3. 44. pl. 14. 40 Ass. pl. 8. 25. Bro. Appeal, 9. 189. 2 R. 3. 21. pl. 50. Bro. Mainprise, 58. S. P. C. 46 D.

Sect. 46. As to the third Point, *viz.* Whether a Person charged as Accessary to more than one Principal, may be tried before all of them have appeared: It seems to be holden by Sir [e] *Matthew Hale*, agreeably to what seems to be the stronger [f] Opinion in *Plowden*, That if a Man be indicted as Accessary to more than one, and one of the Principals appear and be convict, the Court may, if they please, try the Accessary, as being Accessary to such Principal, and also condemn him if the Issue be found against him; and if it be found for him, may afterwards arraign and try him as Accessary to the other when they shall appear, But the contrary Opinion is certainly supported by great [g] Authorities; neither do I find any Instance in the Books wherein the Court hath actually proceeded to the Trial of an Accessary in such a Case before all the Principals have either appeared, or been attainted: And [h] unless there be some very particular Circumstances in the Case, it cannot be doubted but that it will be a weighty Motive to induce the Court in Discretion to respite the Trial of an Accessary, to shew that some of those to whom he is charged as an Accessary, are neither attainted, nor have appeared; for

[f] *'Tis said that the Law was so antiently but that it is now changed.* Yet Dalton ch. 28. S. P. C. Letter D. 1 Plowd. Com. Appeal. 22.

[b] H. P. C. 222. 9 H. 4. 3. a. Fitz. Coro. 77. Bro. Appeal 108. *seems to be for the old Opinion.* [c] H. P. C. 222. Bro. Appeal, 28. 9 H. 4 3. a. Fitz. Coro. 77. S. P. C. 46. And. 109. [d] Fitz. Coro. 12, 124, 463. H. P. C. 222. S. P. C. 46. Letter D. [e] H. P. C. 222. 98, b. 99. [g] S. P. C. 46. G. *See the Books cited to Section* 47. 7 H. 4. 36. pl. 5. *Quare* Bro. 7 H. 4. 36, pl. 5. Keil. 107. [h] Plow. Com. 99. b. 7 H. 4. 36. pl. 5.

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it must be owned, That it is a strong Objection against the trying him immediately, as Accessary to those who do appear, that thereby the Country may be subject to the Trouble of attending two Trials where one might do as well; and the Person tried may be subject to the Hardship and Hazard of two Trials for his Life, which is contrary to the general Course of the Law, (as shall be more fully shewn under the Chapter concerning the Plea of *Autrefoits acquit*,) whereas if the Trial should be deferred till all the Principals be attainted or appear, he would be tried but once. [a] But if there be several Principals, and a Person be charged as Accessary to one of them only, it seems clear, That it is no Objection against his being tried as Accessary to such a Principal, that the others have not yet appeared, nor are attainted, *&c.*

[a] S. P. C. 46. Lett. G.

Sect. 47. As to the fourth Point, *viz.* Whether the Principal and Accessary may be both tried by the same Inquest, and in what Manner they are to be so tried: It seems [b] to be settled at this Day, That if the Principal and Accessary appear together, and the Principal plead the general Issue, the Accessary shall be put to plead also; and that if he likewise plead the general Issue, both may be tried by [c] one Inquest; but that the Principal must be [d] first convicted; and that the Jury shall be charged, that if they find the Principal not guilty, they shall find the Accessary not guilty. But it seems agreed, That if the Principal plead a Plea in Bar, or to the Writ, the Accessary shall not [e] be driven to answer till such Plea be determined.

[b] H. P. C. 222, Dy. 120 p. 10. 2 Inst. 184. 28 E. 3. 94. pl. 3. Fitz. Coro. 10, 17, S. P. C. 46. Lett. F. Rast. Ent. 50. pl. 18. 52, a pl. 15. 54. pl. 5. Fitz Exigent, 4. Mainprise, 3. Cont. Bract. 128, pl. 13, 139, pl. 11, 142, pl. 8, 148 pl. 4. 44 E. 3. 7 pl. 6.

Sect. 48. As to the fifth Point, *viz.* In what Manner the Accessary shall be tried, where his Offence arises in a different County from that of the Principal: It seems to have been [f] agreed antiently, That by the Common Law, if a Town extended into more than one County, and a Felony were committed in that Part of it which lay in one County, and there were Accessaries in that Part of it which lay in another County, an Appeal might be brought against the Accessaries as well as the Principals, in that County in which the principal Felony was committed; and where the Counties were at a Distance, it seems that it may be probably argued, [g] That an Appeal might be brought in like Manner against all in the County wherein the principal Felony was committed; because in an Appeal the Trial may be by a Jury returned from each County. But where one of the Counties can not join with any other in taking an Inquest; as that of *London*, *&c.* it [h] hath been adjudged, That an Appeal against the Accessary could not be brought in either. Also, because there can be no [i] Joinder of Counties for the finding of an Indictment, it seems to have been very [k] doubtful at the Common Law, where the Offence of the Accessary arose in a different County from that of the Principal, whether it could be indicted at all; because the County in which it arose could

Fitz. Coro. 82. 90, 135, 216, 350. Trespass 199. 40 E. 3. 42. pl. 22. 25 E. 3. 44. pl. 14. 40 Ass. pl 8. 25. 44 E. 3. 8. pl. 35. Bro. Appeal, 9. Coro. 11, 118. Mainprise, 58. 2 R. 3. 21. pl. 50.

In all which Books it seems to be holden, That the Accessary is not compellable to answer till all the Principals be convict.

[c] *See the Books cited to Letter* b. Cont Fitz. Coro. 10, 77, 82. 9 H. 4. 3. a. 7 H. 4. 36. pl. 5. Dyer 120. pl. 10, 11. S. P. C. 46 Lett. D. E. F. G. [d] H. P. C. 222. Fitz. Coro. 10. Rast. Entr. 50, b. 51. a, 52, pl. 15. 54. b. 9 Co. 117 [e] Bro. Peremptory, 43. 2 Inst. 184. S. P. C. 46. Lett. F. [f] 44 Ass. pl. 16. 43 E. 3. 17. pl. 21. and f. 34. b. Fitz Coro. 93. Bro. Coro. 125. 45 Ass. pl. 9. Bro. Appeal, 80. *But* S. P. C 63. Lett. H. *this Case seems to be cited with some Doubt.* [g] 3 H. 7. 12. pl. 4. *See* B. 1. ch. 31. Sect. 18. *and* Dyer 38, 39, 40. 7 Co. 2. b. *But* Fitz. Coro. 93. *and* Bro. Coro. 125 *or* 6. *and* Bro. Appeal, 7. *and* 45 Ass. pl. 9. S. P. C. 63. Lett. H. *seems to be contrary.* *And in* S. P. C. 65. Lett. D. *there is an Opinion, That in this Case there shall be several Appeals in the several Counties. But now one Appeal is sufficient, in the Case of Murder, by Force of* 2 *&* 3 E. 6. 24. *set forth more at large in the next Section.* *See* H. P. C. 188. *Quære* 44 Ass pl. 16. 43 E. 3. 17. pl. 21. and f. 34. b. [h] Dyer 38, 39, 40. 7 Co. 2. b. [i] Finch of Law, 411. B. 1. ch. 31. Sect. 13. [k] Kielw. 67. *the Accessary in such Case is said to be indictable in the County in which the principal Felony was committed. But in the Year-Book of* 9 E. 4. 48. pl. 1. *abridged* Fitz. Coro. 33 and Brook Indictm 52 *the Accessary was indicted in the County in which he was Accessary, and the Court wrote to the Justices of the County wherein the principal Felony was committed, to certify whether the Principal were indicted before them.* *And in* S. P. C 90. Let. C. *this Case it holden to be Law.* *See also* 3 Inst. 49, 135. *but in* S. P. C. 63. Lett. H. *It is said, That there was no Remedy at Common Law against the Accessary where his Offence was in a different County from that of the Principal.*

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not take Conuſance of the principal Felony ariſing in another County, without which they could not find that of the Acceſſary.

Sect. 49. But theſe Matters are fully cleared by the Statute of 2 & 3 *E.* 6. 24. by which it is enacted, *Par.* 3. *That an Appeal of Murder may be ſued in the ſame County where the Party felonioufly ſtriken or poiſoned ſhall die, as well againſt the Principals as Acceſſaries, in whatſoever County or Place the Acceſſaries ſhall be guilty; and the Juſtices before whom any ſuch Appeal ſhall be commenced, ſued and taken, within the Year and Day after ſuch Murder and Manſlaughter committed and done, ſhall proceed againſt ſuch Acceſſaries in the ſame County where ſuch Appeal ſhall be ſo taken, in like Manner and Form, as if the ſame Offence of Acceſſaries had been committed in the ſame County where ſuch Appeal ſhall be ſo taken, as well concerning the Trial by the Jurors, or twelve Men of ſuch County where ſuch Appeal ſhall be taken upon the Plea of not guilty, as otherwiſe.*

Sect. 50. And it is farther enacted, *Par.* 4. *That where any Murder or Felony ſhall be hereafter committed and done in one County, and another Perſon, or more, ſhall be Acceſſary or Acceſſaries in any Manner of wiſe, to any ſuch Murder or Felony in any other County, that then an Indictment found or taken againſt ſuch Acceſſary or Acceſſaries upon the Circumſtances of ſuch Matter before the Juſtices of the Peace, or other Juſtices or Commiſſioners, to inquire of Felonies in the County where ſuch Offences of Acceſſary or Acceſſaries in any manner of wiſe, ſhall be committed or done, ſhall be as good and effectual in the Law, as if the ſaid principal Offence had been committed or done in the ſame County where the ſame Indictment againſt ſuch Acceſſary ſhall be found: And that the Juſtices of Gaol-Delivery, of* Oyer *and* Terminer, *or two of them, of or in ſuch County where the Offence of any ſuch Acceſſary ſhall be hereafter committed and done, upon Suit to them made, ſhall write to the* Cuſtos Rotulorum, *or Keepers of the Records, where ſuch Principal ſhall be attainted or convict, to certify them whether ſuch Principal be attainted, convicted, or otherwiſe diſcharged of ſuch principal Felony; who upon ſuch writing to them, or any of them, directed, ſhall make ſufficient Certificate in Writing, under their Seal or Seals, to the ſaid Juſtices, whether ſuch Principal be attainted, convicted, or otherwiſe diſcharged, or not: And after they that ſo ſhall have the Cuſtody of ſuch Records, do certify that ſuch Principal is attainted, convicted, or otherwiſe diſcharged of ſuch Offence by the Law; that then the Juſtices of Gaol-Delivery, or of* Oyer *and* Terminer, *or other thereto authoriſed, ſhall proceed upon every ſuch Acceſſary, in the County where ſuch Acceſſary or Acceſſaries became Acceſſary, in ſuch Manner and Form, as if both the ſaid principal Offence and Acceſſary had been committed and done in the ſame County where the Offence of Acceſſary was, or ſhall be committed or done: And that every ſuch Acceſſary ſhall anſwer upon his Arraignment, and receive ſuch Trial, Judgment, Order and Execution, and ſuffer ſuch Forfeitures, Pains and Penalties, as is uſed in other Caſes of Felony; any Law or Cuſtom to the contrary before uſed in any wiſe notwithſtanding.*

In the Conſtruction of this Statute, the following Points ſeem moſt Remarkable, *viz.*

[a] 2 Co. 118. a. Vide ſupra, ch. 25. Sect. 62.

Sect. 51. *First*, An Indictment againſt an Acceſſary, in purſuance of this Statute, in the County wherein he was Acceſſary, ought expreſsly to recite that the Principal did the Felony in the other County, and not barely that he was indicted for it; for that is only an Argument, and no direct Affirmation that he did it.

Sect. 52. *Secondly*, The Court of [a] King's Bench in Relation to a Person, there indicted, as an Accessary in the County wherein the said Court happens to sit, to a Felony in another County: And the Lord [b] High Steward, in Relation to a Peer to be tried before the Lords on an Indictment against him as Accessary in one County to a Felony in another, are within the Purview of the said Statute; not only because it is a remedial Law, and made to supply a very mischievous Defect of the Common Law, which oftentimes necessarily occasioned a Failer of Justice, and therefore ought to have a beneficial Construction: But also because the Court of King's Bench being the [c] supreme Court of *Oyer* and *Terminer*, and Gaol-Delivery, may naturally be included in the very Words of a Statute which gives such Justices any new Power; or if it be not thought to be strictly within the Words, it is at least within the Meaning of them, which otherwise would give a higher Privilege to an inferior Court than to a superior: And the like in Effect may be said in the Case of the Lord [d] Steward, who by the Words of his Commission, as well as the Nature of the Thing, seems to be a Justice of *Oyer* and *Terminer*, and within the very Words of the Statute, or at least within the Meaning. To which may be added that those Words in the latter Part of the Statute, *That then the Justices of Gaol-Delivery. or of* Oyer *and* Terminer, *or other there authorised, shall proceed against such Accessaries*, &c. seem plainly to imply, That such other so authorited may also send for a Certificate of the Record relating to the Principal; for nothing can be more Natural than to expound one Part of a Statute by another. As to the Objection, That the Words of the Statute are, that the said Justices, *or two of them*, shall write to the *Custos Rotulorum*, *&c.* And therefore that the Lord Steward cannot do it, because he is but one, it may be [e] answered, That those Words are to be thus construed, That where there are two or more such Justices, they must write, *&c.* but not where there is but one.

[a] 3 Inst. 49, 135. 9 Co. 118. H P C. 223. *See the Notes to Section* 48. *under Lett.* [k]

[b] 3 Inst. 49, 135. H. P. C. 223.

[c] Vide supra, Ch. 3. Sect. 11.

[d] 3 Inst. 136.

[e] 3 Inst. 136.

Sect. 53. *Thirdly*, Not only the Justices of the King's Bench, the Pleas before whom are properly styled [f] *Placita coram Rege*, and not *coram Justiciariis*, but any other Justices, writing for a Certificate in pursuance of the Statute, ought to do it by Writ in the King's Name, and not by a Precept in their own Names, and under their own Seals; and the Reason given by *Dyer* is because it is a Writing from Justices to Justices.

[f] Dyer 253, pl. 103, 254. a. 12 Co. 32. H. P. C. 223. *But Sir* Edw. Coke *in* 3 Inst. 49.

Sect. 54. *Fourthly*, Where some of those supposed to have been Accessaries to a Felony in a different County, are proceeded against in the King's Bench, in pursuance of the Statute, if there be a likelihood that others will be in the same Manner proceeded against in another Court, it seems most adviseable [g] to send for the Record relating to the Principal by a special Writ formed upon the Matter according to the Words of the Statute, and not by *Certiorari*, because that would wholly [h] remove the Record from the Court below into the Court of King's Bench, which might cause a Doubt, whether either the Court below, or that of King's Bench could certify it upon a subsequent Writ; for as to the Court below, it might be objected, That being no longer a Record of that Court, it cannot be certified by it; and as to the King's Bench, it might be objected, That the Principal was neither attainted nor convicted there: Whereas the Words of the Statute are, *That the Justices shall write to the Keepers of the Records where such Principal shall be attainted or convicted.* But these Doubts are avoided by [i] directing a special Writ to the Court below,

135. seems to make it necessary for the Justices of the King's Bench only to write in the King's Name.

[g] 3 In6. 49. 136.

[h] Vide supra, Ch 27. Sect. 62 *to* 69. and Sect. 77 *to* 87.

[i] 3 Inst. 49. 136. Vide H.P. C. 223.

below, on which a ſpecial Certificate ſhall be made in purſuance of the Statute, and the Record ſhall ſtill remain below, and conſequently may be certified from thence on a ſubſequent Writ.

CHAP. XXX.

Of ſtanding Mute.

HAving ſhewn in what Manner a Priſoner is to be arraigned, I am in the next Place to examine in what Manner he is to be dealt with afterwards; and to that End ſhall endeavour to ſhew what is to be done with him,

1. Upon his ſtanding Mute.
2. Upon his Confeſſion.
3. Upon his Pleading.

And firſt, as to the Priſoner's ſtanding Mute, I ſhall conſider,

1. Where he ſhall be ſaid to ſtand Mute.
2. How it ſhall be tried whether he do ſo of Malice, or by the *Act* of God.
3. What ſhall be done where one is found to ſtand Mute by the *Act* of God.
4. Where he who ſtands Mute ſhall be awarded to the ſame Execution as if he had not ſtood Mute, and where he ſhall be adjudged to his Penance.
5. What is the Nature of ſuch Penance.
6. What he ſhall forfeit, and to whom.
7. Whether the Proſecutor of an Indictment or Appeal of Larceny be intitled to a Reſtitution of the Goods ſtolen, upon the Defendan's ſtanding Mute.
8. Where one that ſtands Mute ſhall have the Benefit of the Clergy.

Sect. 1. As to the firſt Point, *viz.* In what Caſes a Man ſhall be ſaid to ſtand Mute: I take it to be agreed, That he who anſwers impertinently, or ineffectually, or refuſes to put himſelf upon his Trial in ſuch Manner as the Law directs, may as properly be ſaid to ſtand Mute as he who makes no Anſwer at all; as where a Man [a] refuſes to plead a Plea in Chief, or the General Iſſue, but inſiſts on ſome frivolous Defence, or even to plead a good [b] dilatory Plea, and refuſes to plead over to the Felony, in which Caſe, after ſuch Plea is found againſt him, he ſhall not [c] be admitted to plead in Chief, but ſhall be adjudged to his Penance in the ſame Manner as if he had made no Plea at all. And ſo ſhall he be who

[a] Dy. 241, 49. H. P. C. 226. S. P. C. 150. Letter, E.
[b] Keilw. 70. a. Vide Bro. Coro. 22.
[c] Keilw. 70. a.

who pleads a good Plea in Chief, or the General Iſſue, but [a] refuſeth to put himſelf upon the Inqueſt (that is, to be tried by God and his Country if a Commoner, or by God and his [b] Peers, if a Lord) or to wage Battle where ſuch Trial is [c] allowed.

Sect. 2. It ſeems to be holden in the [d] ſecond *Inſtitute*, and alſo in the latter Part of Sir *Mathew Hale*'s *Pleas of the* [e] *Crown*, That if a Priſoner on his Trial peremptorily challenge above the Number allowed him by Law, he ſhall not be dealt with as one that ſtands Mute, but ſhall be hanged: But this very Point is made a *Quære* in another [f] Part of *Hale*'s *Pleas of the Crown*; and alſo in [g] *Kelynge*, and the contrary is holden in the third [h] *Inſtitute*: Neither does it ſeem eaſy to aſſign a Reaſon why he who challenges more Jurors than he ought, ſhall, in Reſpect of an implied Refuſal of a legal Trial, be thought worthy of a greater Puniſhment than he who obſtinately, directly, and expreſsly refuſes it. To which may be added, That there ſeems to be but one * full Authority in the Old Books for the Maintenance of this Opinion, whereas there is a great [i] Number of the other Side.

Sect. 3. But it is clear, [k] That he who demurs in Law to an Indictment or Appeal, ſhall not be eſteemed to ſtand Mute, nor be dealt with as ſuch, as having refuſed a Trial by his Country, for he puts himſelf upon a Trial by the Court, which is the proper Trial of a Matter in Law.

Sect. 4. Alſo it ſeems clear, That after a Man hath † confeſſed himſelf guilty, or pleaded, and put himſelf upon his [l] Country, he ſhall not afterwards be demeaſned as one that ſtands Mute, in Reſpect of his ſubſequent Silence: But the Jury ſhall be charged, and the Trial ſhall proceed, and the like Judgment ſhall be given as in Common Caſes.

Sect. 5. As to the ſecond Point, *viz.* In what Caſes, and in what Manner it ſhall be tried, whether one who ſtands Mute do ſo of Malice, or of the Act of God: It ſeems agreed, [m] That where a Priſoner wholly ſtands Mute without making any Anſwer at all, the Court ſhall take an Inqueſt of Office by the Oath of any [n] twelve Perſons that [o] happen to be preſent, whether he do ſo of Malice, or by the Act of God. But [p] after an Iſſue hath been joined, if the Priſoner ſtand Mute when the Jury are in Court, if there be any need for ſuch Inquiry, it ſhall be made by them, and not by an Inqueſt of Office.

Sect. 6. Where [q] a Man anſwers, but not effectually, it ſeems needleſs to make any Inquiry whether his Refuſal be owing to his Malice or not, becauſe it is apparent.

Sect. 7. As to the third Point, *viz.* What ſhall be done where one is found to ſtand Mute by the Act of God: It is agreed, [r] That in ſuch a Caſe, the Judges of the Court, (who are always to be of Counſel with the Priſoner, to ſee that he have Law and Juſtice) ſhall not only cauſe the Felony to be enquired of, but alſo whether the Priſoner be the ſame Perſon, and all other Matters which he might have pleaded in his Defence. And ſuch Inquiry ſhall be made, as I ſuppoſe, not by an Inqueſt of Office,

[a] Bro. Pain. 2, 14, 15. S. P. C. 150. Lett. E. Bro. App. 93. 2 Inſt. 178. H. P. C. 226. Fitz. Coro. 27, 30, 359. 4 E. 4. 11. pl. 18. 7 E. 4 29 pl. 13. 14 E. 4. 7. pl. 10. 3 Inſt. 227. Vide Bro. Coro. 149. 8 E. 4 3. pl 6.

[b] Kely. 57.

[c] *For this ſee Chapter of the Trial by Battel, and* S. P. C. 81. Lett. E.

[d] 2 Inſt. 178.

[e] H. P. C. 259.

[f] H. P. C. 226.

[g] Kely. 36.

[h] 3 Inſt. 227.

[*] 3 H. 7. 12. pl. 5. *Abridged* Fitz. Coro. 56. *And* Bro. Cor. 135 *or* 6. *And* Bro. Pain 5. *And Note, there is no other Authority cited for this Opinion by* Coke, Hale, *or* Kelynge. 2 Inſt. 178. H. P. C. 259. Kely. 36.

[i] Fitz. Coro. 359. 3 H. 7. 12. pl. 8. *Abridged* Fitz. Fitz. Coro. 51. *and* Bro. Clergy, 27. *And Note that this Caſe is the more remarkable, becauſe of the very ſame Year with the former, and ſubſequent to it.*

Vide Kely. 36. 3 H. 7. 2. pl. 5. *the like is ſaid to be adjudged by all the Juſtices but* Keble; *and this Caſe is abridged* Bro. Appeal 82. Pain, 4. [k] *See the next Chapter, Sect.* 5. † S. P. C. 150. Lett. C. *Same Point admitted* 8 H. 4. 3. pl. 5. *which is abridged*, Bro. Pain, 2. *but in theſe Books it is incidently holden, That where a Man does not confeſs, but pleads not Guilty, and after ſtands Mute, he ſhall be put to his Penance.* [l] Kely. 36, 37. H. P. C. 225, 226. 15 E. 4. 33. pl. 19. *Abridged* Bro. Penance, 9. and Bro. Coro. 51. Cont. 8 H. 4. 3. pl. 5. *for which ſee the Note next above.* [m] H. P. C. 225. S. P. C. 150. Lett. C. 2 Inſt. 177, 178. 8 H. 4. 1. pl. 2. Fitz. Coro. 71, 225. 43 Aſſ. pl. 30. Bro. Appeal, 24. [n] Ra. Ent. 385. pl. 3. [o] 8 H. 4. 1. pl. 2. Fitz. Coro. 71. Bro. Appeal, 24. [p] S. P. C. 150. Lett. D. *from the Authority of* 8 H. 4. 3. *for which ſee the Notes to the precedent Section.* [q] Vide H. P. C. 225, 226. S. P. C. 150. Lett. D. 2 Inſt. 177, 178. H. P. C. 225. [r] S. P. B. 150. Lett. D. 2 Inſt. 177, 178.

but

but by a Jury returned by the Sheriff in the ſame Manner as if the Defendant had actually pleaded; for ſince it is no way his Fault that he did not ſo plead, there is no Reaſon why his Trial ſhould be in a more looſe and ſummary Manner, or any way leſs regular, or ſolemn, than if he had. To which may be added, That Sir *Mathew Hale* ſaith, [a] *That the Felony ſhall be enquired of*, &c. *in the ſame Manner as if the Priſoner had pleaded Not guilty*; from which Words it ſeems plain, That in his Opinion the Inquiry ought to be by an Inqueſt returned by the Sheriff as in other Trials at the Miſe of the Parties, becauſe if the Defendant had pleaded, it muſt certainly have been ſo. And therefore it ſeems reaſonable, That where Sir *William Staundforde* [b] having ſpoken of ſuch Inquiry, adds immediately, That it is but an Inqueſt of Office, ought to be underſtood, not of the Inquiry of the Felony, whereof he had laſt ſpoken, but of the Inquiry whether the Priſoner ſtood Mute of Malice, or by the Act of God, whereof he had ſpoken in the Sentence next before. And I the rather incline to think that this is his Meaning, becauſe the [c] Books cited by him, to this Point, relate to this Inquiry only.

[a] H. P. C. 225.

[b] S. P. C. 150. Lett. D.

[c] Fitz. Coro. 225. 43 Aſſ. pl. 30. 8 H. 4. 1. pl. 2.

As to the fourth Point, *viz.* In what Caſes he that ſtands Mute ſhall be awarded to the ſame Execution as if he had not ſtood Mute, and where he ſhall be adjudged to his Penance, I ſhall conſider,

1. What ſhall be done to him who ſtands Mute after an Attainder.
2. What to a Perſon arraigned for High Treaſon.
3. What to one arraigned for Petit Larceny.
4. What to one arraigned for a Felony by Statute.
5. What to one arraigned upon an Appeal.
6. What to one indicted of a capital Felony, or Petit Treaſon.

Sect. 8. As to the firſt Particular, *viz.* What is to be done to him who ſtands Mute after an Attainder: It ſeems to be ſettled [d] at this Day, That where-ever one who is attainted, either by Judgment on a Verdict, or Confeſſion, or by Outlawry, or Abjuration, ſtands Mute to the Demand why Execution ſhould not go againſt him, he ſhall not be awarded to his Penance, but to the ſame kind of Execution, if any, that wou'd have been awarded if he had not ſtood Mute. Yet there ſeems to be this Difference, That where one who hath always continued in Priſon, after an Attainder by Verdict or Confeſſion, ſtands Mute to the Demand why Execution ſhould not go, it ſhall be awarded [e] againſt him, without any Inquiry whether he ſtand Mute by Malice, or otherwiſe, or whether he be the ſame Perſon who is ſo attainted or not; becauſe it ſufficiently appears that he is the ſame Perſon, and that is ſufficient to juſtify an Award of Execution againſt him, where nothing appears to the contrary. But if a Perſon ſo attainted, be re-taken after an Eſcape; or if one be taken after an Outlawry or Abjuration, and ſtand Mute to the Demand, Why Execution ſhould not go againſt him? it ſhall be inquired whether he ſtand Mute of Malice, or of the Act of God; and if it be found of Malice, it ſeems that Execution ſhall be awarded without any farther inquiry: [g] But if it be found to be of the Act of God, it ſeems that it ought to be alſo inquired, whether he be the ſame Perſon or not, in the ſame Manner as where one ſtands Mute by the Act of God, when firſt brought upon his Trial.

[d] H. P. C. 226. Kelv. 36. S. P. C. 150. Lett. C. D. *So adjudged*, 8 H. 4. 3. pl. 5 *Abridged* Bro. Pain, 2. Coro. 22 *as to the Caſe of Abjuration or any other Attainder after a Confeſſion; but the contrary is inſinuated as to other Attainders But in* 26 Aſſ. pl. 19 *Abridged* Fitz. Coro. 191. Bro. Pain 12. Coro. 99 *one who had abjured ſtanding Mute, was put to his Penance, and not hang'd.*

[e] S. P. C 150. Lett. C. D.

10 E. 4. 19. pl. 26. Fitz. Coro. 36. Bro. Coro. 155. [g] S. P. C. 150. Lett. C. D. 10 E. 4. 19. pl. 26. Fitz. Coro. 36. Bro. Coro. 155.

Sect.

Sect. 9. As to the ſecond Point, *viz.* What is to be done to one who ſtands Mute to an Arraignment for High Treaſon: It is clearly ſettled [a] at this Day, That ſtanding Mute upon an Arraignment for High Treaſon is equivalent to a Conviction by Verdict, or Confeſſion, and conſequently ſubjects the Criminal to the ſame Kind of Judgment and Execution as ſuch a Conviction would do. But I take it for granted, That ſuch ſtanding Mute muſt in [b] like manner appear to be obſtinate; and that if it be found to be the Act of God, the whole Matter ſhall in like Manner [c] be inquired of, as hath been more fully ſhewn in the former Part of this Chapter. But where ſuch Priſoner appears to ſtand obſtinately Mute, I do not find it any where holden, That there is any Neceſſity that he probably appear to be Guilty, or that any Evidence be examined to prove him ſo, before he ſhall be condemned or executed. But this is adviſeable, where one ſtands obſtinately Mute on an Arraignment for Felony by Statute, as ſhall be more fully ſhewn in the fourteenth and fifteenth *Sections*.

[a] H. P. C. 226. Savil. 56. pl. 121. Kely. 57. Dyer 205. pl 4. 2 Inſt. 177, 178. Bro. Pain, 19 Co. Litt. 391 3 Inſt. 14. S. P. C. 150. Lett. C. Cont. Fitz. Coro. 283.

[b] Vide ſupra, Sect. 5, 6. 18 E. 3. pl 26. S. P. C. 150. Lett. D

Sect. 10. As to the third Particular, *viz.* What is to be done to one who ſtands Mute to an Arraignment for Petit Larceny: I take it to be agreed, [d] That if a Man appear to ſtand obſtinately Mute on an Arraignment for Petit Larceny, he ſhall have the like Judgment, *&c.* as if he had confeſſed the Indictment.

[c] Vide ſupra, Sect. 7. S. P. C. 150. Lett. D.

[d] 2 Inſt. 177.

Sect. 11. As to the fourth Particular, *viz.* What is to be done to thoſe who ſtand Mute to an Arraignment for Felony by Statute: It is expreſſly enacted by 33 *H.* 8. 12. *Par.* 12. *That if a Perſon indicted, and arraigned of Treaſon, Miſpriſion of Treaſon, Murder, Manſlaughter, or Bloodſhed,* &c. *againſt that Act, within the Verge of the Court, ſhall obſtinately refuſe to anſwer directly, or ſhall ſtand Mute, he ſhall have like Judgment,* &c. *as if he were found Guilty,* &c, But [e] where a Statute, as that of *Piracy, &c.* ordains a Trial by the Common Courſe of the Law, it hath been adjudged, That the Criminal ſhall have Judgment of his Penance, *&c.* as in other Felonies.

[e] Dyer 241. pl. 49. 3 Inſt. 114. B. 1. Ch. 37. pl. 9. S. P. C. 150. Lett. C.

Sect. 12. As to the fifth Particular, *viz.* What is to be done to one who ſtands Mute to an Arraignment on an Appeal: It is holden by Sir *Matthew Hale,* [f] That an Appellee of Felony ſtanding Mute ſhall not have Judgment of Penance, but to be hanged; but this is made a *Quære* in [g] *Staundforde,* and [h] *Brook*; and the contrary Opinion ſeems to be favoured by Sir [i] *Edward Coke,* and is expreſsly holden by [k] *Kelynge,* and ſupported by ſeveral [l] Reſolutions in the Old Books. Whereas the *Year-Book* of 21 [m] *E.* 3. ſeems to be the only Reſolution in favour of the other Side; to which it may be anſwered, Not only that three of the abovecited Reſolutions to the contrary, are much later, but alſo that the Appellee in this Caſe appears to have been taken with the Manner, [n] which probably might be a Circumſtance of conſiderable weight in the Judgment.

[f] H. P. C. 226.

[g] S. P. C. 150. Lett. B.

[h] Bro. Pain. 8, 19.

[i] 2 Inſt. 178, 179.

[k] Kely. 37.

[l] 18 H. 4. 1. pl. 2. *Abridged* Bro. Pain, 1. Forfeiture, 11. Appeal, 24. Fitz. Coro. 71.

Sect. 13. As to the ſixth Particular, *viz.* What is to be done to one who ſtands Mute to an Indictment of a Capital Felony, or a Petit Treaſon: It is enacted by the [o] abovementioned Statute of *Weſtminſter,* 1. 12. *That notorious Felons which openly be of evil Fame, and will not put themſelves*

4 E. 4. 11. pl. 18. *Abridged* Fitz. Coro. 71.

Bro. Appeal 93. Pain, 14. 43 Aſſ. pl. 30. *Abridged* Bro. Pain, 13. Appeal, 78. Coro. 123 *or* 124. Fitz. Coro. 225. 14 E. 4. 7. pl. 10. *This Point is made a Quare; but in the very next folio* pl. 17. *abridged* Bro. Coro. 160 *or* 161. *it is adjudged by all the Juſtices, That the Appellee in ſuch Caſe ſhould have his Penance.* [m] 21 E 3. 18. pl. 26. *Abridged* Bro. Pain, 8. Appeal, 40. Coro. 43. *But neither* Fitz. Coro. 56. *nor* 3 H. 7. 2. pl. 5. *nor* 3 H. 7. 12. pl. 5. *cited by* Staundforde, *ſeem to come up to this Point, but rather to be Authorities of the other Side. See* Bro. Coro. 82. [n] Vide ſupra Ch. 15. 41. [o] Vide 2 Inſt. 177, 178.

in Enquests of Felonies, that Men shall charge them with before the Justices at the King's Suit, shall have strong and hard Imprisonment, as they which refuse to stand to the Common Law of the Land. But this is not to be understood of such Prisoners as be taken on light Suspicion.

[a] 2 Inst. 177. *Sect.* 14. Sir [a] *Edward Coke*, in the Construction of this Statute, saith, That no Person shall be put to this Punishment, unless the Matter be evident, or probable, which it is the Duty of the Judge to look into; and Sir *William* [b] *Staundforde*, saith, That there ought to be evident or probable Matter to convince the Party of the Crime whereof he is arraigned, or otherwise that he be a notorious Felon, or openly of bad Fame; and therefore he advises the Judge, for the satisfaction of this Statute, and discharge of his Duty, to examine the Evidence which proves the Prisoner Guilty of the Fact, before he proceed to the Judgment of *Pain fort & dure*. Yet I cannot find any Book which takes Notice of any Examination of this Kind, or of any Entry that the Defendant appeared to be a notorious Felon, before such Judgment given against him, upon his standing Mute, whether upon an [c] Indictment or [d] Appeal: But all the Books cited in the Margin seem to intimate, That the standing Mute is of itself a sufficient Ground for such Judgment. Yet all that can be inferred from thence seems to be this, That it is not necessary to make any thing of this Kind Part of the Record, it being a Matter left to the Discretion and Conscience of the Judge, and to be presumed where it is not expressed. But as to all Capital Appeals whatsoever, and all Indictments and Appeals of Petit Treason, perhaps it may be said, That [e] not being within this Statute, but remaining as they were at the Common Law, the Obstinacy of a Criminal in standing Mute to them, may be of it self, without more, a sufficient Inducement to a Judge to award him to his Penance. But considering that such Appeals and Indictments are within the same Reason with those mentioned in the Statute; and it is uncertain how the Common Law stood in Relation to these Matters, as appears by the best Authors, [f] differing among themselves concerning them; and seeing the Method prescribed by the Statute is very just and equitable, it seems prudent at least in a Judge to observe the same Rules in all Cases of this Kind.

[b] S. P. C. 150. Letter A. Vide H. P. C. 226.

[c] Ra. Ent. 385. pl. 2, 3. Keilw. 70. a. 7 E. 4. 29. pl. 13. 3 H. 7. 12. pl. 5, 8.

[d] 8 H. 4. 1. pl. 2. 4 E. 4. 11. pl. 18. 14 E. 4. 7. pl. 10. 43 Ass pl. 30. 21 E. 3. 18. pl. 26. 3 H. 7. 2 pl. 5.

[e] S. P. C. 150. Lett. B. C. 2 Inst. 177, 178, 179. *And the Books cited Sect.* 12. *under Lett.*

[f] S. P. C. 149 Lett. F. 2 Inst. 178, 179.

Sect. 15. I do not find it said in any Book, what shall be done to a Prisoner who obstinately standing Mute to an Arraignment, shall appear to be charged upon very light Suspicion; but I take it for granted, That he may be severely fined and imprisoned for his Contempt.

Sect. 16. As to the fifth Point, *viz.* What is the Nature of the Penance to which a Prisoner is to be adjudged upon his obstinately standing Mute: It is observable, That the above-cited Statute of *Westm.* 1. says only in general, That Felons standing Mute shall be put *in Prison fort & dure*, without saying any thing of the Manner of it, which it seems to leave as a known Thing to the usual Practice in such Cases; which we shall best find from the Books of Entries, and other Law Books, all of which generally agree, That the Prisoner shall be remanded [g] to the Place from whence he came, and put [h] in some low dark Room, [i] and

[g] H. P. C. 227. S. P. C. 150. Lett. E.

Kielw. 70. a. 4 E. 4 11. pl. 18. 14 E. 4. 8. pl. 17. *Abridged* Bro. Coro. 160. 2 Inst. 178. Ra. Ent. 385. pl. 17. 8 H. 4. 1. pl. 2. [h] *This Clause is omitted in* Keilw. 70. a. 4 E. 4. 11. pl. 18. *but is mentioned in all the other Books above-cited, but with this Difference, That* 14 E. 4 11. pl. 17. *says only that he shall be put in a Chamber, without adding that it shall be low or dark.* [i] *In this all the Books above-cited seem to agree. And* 14 E. 4 8. pl. 17. *and* S. P. C. 150. Lett. E. *and* 2 Inst. 178. *add, That he shall lie without any Litter or other thing under him, and that one Arm shall be drawn to one quarter of the Room with a Cord, and the other to another, and that his Feet shall be used in the same Manner. But these Clauses are wholly omitted in all the other Books above-cited, except* H P. C. *which takes Notice of the Latter of them only. And* Ra. Ent. 385. pl. 2. *adds, That a Hole shall be made for the Head, and* Keil. 70. a. *says, That the Head shall not touch the Earth; but none of the other mention either of these Clauses.*

there laid on his Back, without any manner of Covering, except for the Privy Parts, and * that as many Weights shall be laid upon him as he can bear, and more, and that he shall have no manner of Sustenance but of the worst [a] Bread and [b] Water, and that he shall [c] not eat the same Day in which he drinks, nor drink the same Day on which he eats; and that he shall so continue till he [d] die. But it is said [e], That antiently the Judgment was not, That he should so continue till he should die, but till he should answer, and that he might save himself from the Penance by putting himself on his Trial, which he cannot do at this Day after the Judgment of Penance is once given.

Sect. 17. It seems clear, [f] That Women upon standing Mute, are liable to such Penance as well as Men.

Sect. 18. It is said [g] to be the constant Practice at *Newgate* Sessions, where a Prisoner refuses to plead, to endeavour to compell him to do it by tying his Thumbs together with Whipcord, and not to proceed to the Judgment of Penance, before all Methods of persuading him to plead, are found ineffectual.

Sect. 19. As to the fifth Point, *viz.* What he who obstinately stands Mute shall forfeit, and to whom: There is no doubt but that in Case of [h] High Treason he shall forfeit both Lands and Goods, in the same Manner as if he had been attainted any other way. Also I take it for granted That in the Case of Felony and Petit Treason, where a Person by standing Mute shall not avoid being attainted for such Crimes, he shall forfeit his Lands and Goods in the same manner as on other Attainders. But where-ever a Person standing Mute is adjudged to his Penance, and thereby prevents that Attainder which otherwise he might have incurred, it seems agreed, [i] That he forfeits his Chattels only, and not his Lands.

Sect. 20. It is agreed in the *Year-Book* of 8 [k] *H.* 4. That the Goods so forfeited ought not to be delivered to any Person claiming them under a Grant from the Crown, till he have shewed a good Title to them in the King's Court, by some Grant sufficient to pass them.

Sect. 21. And it seems [l] That such Goods will not pass by Grant of all Felons Goods, having no Words specially extending to the Goods of those who stand Mute, *&c.* because a Person adjudged to his Penance for standing Mute, does not seem to suffer as a Felon, being neither attainted nor convicted of any Felony, but as a Person refusing to stand to the Law of the Land. And it seems rather the stronger Opinion, [m] That they pass not by the Grant of *all Goods of Felons and Fugitives of all Persons within such a District; so that if such Persons for any Trespass or other Fault ought to lose Life or Member; or shall fly and refuse to stand to Judgment, or do any other Trespass for which they ought to lose their Chattels.*

Sect. 22. As to the sixth Point, *viz.* Whether the Prosecutor of an Indictment or Appeal of Larceny be intitled to a Restitution of the Goods stolen, upon the Defendant's standing Mute: It seems agreed, [n] That by the Common Law, where a Person stands Mute to an Appeal of Larceny, it is proper to charge the same Inquest which is to enquire whether the standing Mute be of Malice or not, to inquire also whether the Goods mentioned in the Appeal are the Goods of the Appellant, and whether the Defendant were taken upon a fresh Suit [o] made by such Appellant,

* *In this all the Books above-cited agree.*

[a] *But* 14 E. 4. 8. pl. 17. S. P. C. 150. Lett. E. *and* 2 Inst. 178. *are, That he shall only have three morsels of Barley Bread a Day,* Keilw. 70. a. *that he shall have only Rye Bread;* *and* Ra. Ent. 385. pl. 2 *and* 2 H. 4. 1. pl. 2. *generally that he shall have of the worst Bread.*

[b] 14 E. 4. 8. pl. 17. S. P. C. 150. Lett. E. 2 Inst. 178. *and* 8 H. 4. 1. pl. 2. *and* Keilw. 70. a. *are, That he shall have the Water next the Prison, so that it be not current; but* Ra. Ent. 385. pl. 5. *is general, That he shall have the worst Water.*

[c] *This is omitted in* Keilw. 70. a. *and in* 8 H. 4. 1. pl. 2.

[d] *This is omitted in none of the Books above cited, except* 14 E. 4. 11. *and* H. P. C. 227 *but neither of these Books give the whole Judgment at Large.*

[e] S. P. C. 150. Lett. F. 151. Lett. E. Briton 11.

[f] 2 Inst. 177.

[g] Kely. 27, 28.

[h] *See the Books cited to Sect* 9.

[i] 14 E. 4. 7. p. 10 H. P. C. 226, 227. Co. Litt 391. Fitz Esc. 10. Coro. 51. Ass. 421.

[k] 8 H. 4. 2. a.

S. P. C. 151. a. Bro. Forfeiture, 11, 64. Appeal, 24. 8 H. 4. 1. b. 2. a. b. 3 H. 7. 12. pl. 8. Bro. Appeal, 24. [l] Dy. 268. pl. 18. 8 H. 4. 2. a. b. Bro. Forfeiture, 11. [m] Dy. 268. pl. 18. 8 H. 4. 2. a b, Bro. Forfeit. 11. [n] Vide supra Ch. 23. Sect. 53. Lett. F. 8 H. 4. 1. pl. 2. *Abridged* Bro. Appeal, 24. S. P. C. 166. [o] Vide ch. 23. Sect. 50, 51, 52.

which

which Points being found [p] for him, he ſhall have an Award of Reſtitution to ſuch Goods, and to ſuch only, [q] in whoſe Hands ſoever [r] they are found. And it is ſaid in general in ſome Books, [a] That in an Appeal of Larceny there ſhall be a Reſtitution of the Goods, upon the Appellee's ſtanding Mute, without ſaying any thing of any Inquiry concerning the Property, or freſh Suit: But I take it for granted, That where it is ſo omitted, it is taken as a Thing known, and done of Courſe, and therefore needleſs to be expreſly mentioned.

[p] Supra Ch. 23. Sect. 53.
[q] Supra Ch. 23. Sect. 57.
[r] Supra Ch. 23. Sect. 54.
[a] 21 E. 3. 18. pl. 26. *Abridged* Bro. Appeal, 40. 43 Aſſ. pl. 30. *Abridged* Bro. Appeal, 78. Coro. 123 *or* 124. Fitz. Coro. 225. Vide 40 Aſſ. pl. 39. *Abridged* Fitz. Coro. 217.

Sect. 23. But it ſeems queſtionable, Whether the Proſecutor of an Indictment of Larceny, be in like manner intitled to a Reſtitution, upon the Defendant's ſtanding Mute? Becauſe it ſeems agreed, [b] That by the Common Law there could be no ſuch Reſtitution upon any other Proſecution but an Appeal; and it is certain, That the Proſecutor of an Indictment is not intitled to a Reſtitution by the expreſs Words of 21 * *H.* 8. 11. which require, *That the Felon be found guilty, or otherwiſe attainted*, &c. And I do not know that he is intitled to it by any other Statute, or any equitable Conſtruction of this.

[b] Supra Ch. 23 Sect. 55, 56.
* *Set forth more more at large*, Ch. 23. Sect. 55.

Sect. 24. As to the ſeventh Point, *viz.* Where one who ſtands Mute ſhall have the Benefit of his Clergy: It ſeems clear, [c] That unleſs it happen to be otherwiſe ſpecially provided by ſome Statute, where-ever he ſhall be allowed it upon a Conviction, by Verdict or Confeſſion, he ſhall have it upon his ſtanding Mute. Alſo I take it to be agreed, [d] That a Statute taking away the Benefit of the Clergy from thoſe who ſhall be convicted of a Crime, doth not thereby take it away from thoſe who ſtand Mute on an Indictment or Appeal for ſuch Crime. But it is enacted by 3 & 4 *W.* & *M.* 9. ſet forth more at Large in the Chapter of *Clergy*, *That if any Perſon ſhall be indicted of any Offence, for which by Vertue of any former Statute, he is excluded from the Benefit of his Clergy, if he had been thereof convicted by Verdict or Confeſſion, if he ſtand Mute he ſhall not be admitted to it.* But Appeals, and Offences excluded from the Benefit of the Clergy by ſubſequent Statutes, ſeem not to be within the Purview of this Statute, for the fuller Conſideration whereof I ſhall refer the Reader to the Chapter of *Clergy*.

[c] Fitz. Coro. 233, 283. Aſſ. 421. 8 H. 4. 3. pl. 5. H. P. C. 231. Moore 550. pl. 738. 3 H. 7. 12. pl. 8. *Abridged* Bro. Clergy, 27. Fitz. Coro. 51. 3 H. 7. 12. pl. 10. *Abridged* Fitz. Coro. 53. Fitz. Cor. 58.

Seems contrary, but I cannot find any thing in 3 H. 7. 1. *Which is the* Year-Book *cited to this Note to warrant this Opinion.*

[d] *See* H. P. C. 232 *to* 238.

CHAP.

CHAP. XXXI.

Of Confeſſion and Demurrer.

AND now I am to conſider what is to be done to a Priſoner upon his Confeſſion, which may be either,

1. Expreſs, or,
2. Implied.

Sect. 1. An expreſs Confeſſion is where a Perſon directly confeſſes [a] the Crime with which he is charged, which is the higheſt Conviction that can be, and may be received [b] after the Plea of Not Guilty recorded, notwithſtanding the Repugnancy; for the Entry is, That the Defendant *poſtea*, or *relicta verificatione*, *cognovit indictamentum.*

Sect. 2. Such a Confeſſion carries with it ſo ſtrong a Preſumption of Guilt, that an Entry [c] on Record *quod cognovit indictamentum, &c.* in an Indictment of Treſpaſs, eſtops the Defendant to plead not Guilty to an Action brought afterwards againſt him for the ſame Matter. But it ſeems queſtionable, Whether ſuch Entry of a Confeſſion of an Indictment of a Capital Crime, will in like Manner eſtop a Defendant to plead Not Guilty to an Appeal, becauſe in Caſe of Life, the Court will be very tender in going upon Preſumptions. And where a Perſon upon his Arraignment actually confeſſes [d] himſelf guilty, or unadviſedly diſcloſes the Special [e] Manner of the Fact, ſuppoſing that it doth not amount to Felony, where it doth, yet the Judges, upon probable Circumſtances, that ſuch Confeſſion may proceed from Fear, Menace, or Dureſs, or from Weakneſs or Ignorance, may refuſe to record ſuch Confeſſion, and ſuffer the Party to plead Not guilty.

Sect. 3. An implied Confeſſion is where a Defendant in a Caſe not Capital, doth not directly own himſelf Guilty, but in a Manner admits it by yielding to the King's Mercy, and deſiring to ſubmit to a ſmall Fine; in which Caſe, if the Court think fit to accept of ſuch Submiſſion, and make an Entry that the Defendant *poſuit ſe in gratiam Regis*, without putting him to a direct Confeſſion, or Plea, (which in ſuch Caſes ſeems to be left to Diſcretion) the Defendant ſhall [f] not be eſtopped to plead Not guilty to an Action for the ſame Fact, as he ſhall [g] be where the Entry is *quod cognovit indictamentum.*

Sect. 4. I take it for granted, That no Confeſſion whatever ſhall, before final [h] Judgment, deprive the Defendant of the Privilege of taking Exceptions in Arreſt of Judgment to Faults apparent in the Record; [i] for the Judges muſt *ex officio* take Notice of all ſuch Faults, and any one, as *amicus Curiæ*, may inform them of them.

[a] Vide S. P. C. 142. Lett. C. Lamb. B. 4. Ch. 9. Finch of Law 38.

[b] Kely. 11. *Quære if the Law be the ſame in Civil Actions. Affirmed* Cro. E. 144. pl. 3. *Denied* 2 Jon. 156.

[c] 9 H. 6. 60. a. Fitz. Eſtopp. 24. 102. 11 H. 6. 65. pl. 21. Lamb. B. 4. ch. 9. Trial per Pais 25.

[d] S. P. C. 141. Lett. C.

[e] 22 Aſſ. pl. 71. *Abridged* Fitz. Coro. 180. 27 Aſſ. pl. 40.

[f] 9 H. 6. 60. a. *Abridged* Fitz. Eſtoppel, 24. 11 H. 4. 65. pl. 21. Lamb. B. 4. Ch. 9.

[g] Supra §. 2.

[h] 1 Salk. 77, 78.

[i] Finch of Law, 226 2 Danv. Abr. 252. 2 Lev. 223.

Sect. 5. It ſeems to be taken for granted, both by [a] *Brook* and [b] *Staundforde*, [c] *Coke* and [d] *Hale*, ſpeaking, as I ſuppoſe, of a general Demurrer, That it amounts ſo far to a Confeſſion of the Indictment as laid, that if the Indictment be good, Judgment and Execution ſhall go againſt the Priſoner. But it is obſervable, That no adjudged Caſe is cited for the Maintenance of this Opinion, nor any Authority from the Old Books except the *Year-Book* of 14 *Ed.* 4. *pl.* 9. in which it is reported to have been ſaid by *Choke*, That if a Defendant demur to a Plea, he ſhall be hanged, *quod fuit conceſſum.* But to this it may be ſaid, That it was only ſpoken incidently, and not a Point adjudged; and beſides that it is ſo ſhort and obſcure that it is ſcarce intelligible, which appears by *Brook*'s abridging it in different Senſes; for in one Place [e] he ſeems to underſtand it of a Demurrer by a Defendant to a Plea in Bar, which ſeems impoſſible; and in another [f] Place he ſeems to underſtand it in a different Senſe. And therefore perhaps the Meaning of it may be only this, That after a Defendant hath pleaded ſuch a Bar, as confeſſes the Fact, and concludes him to plead the General Iſſue afterwards, as ſome Pleas are ſaid [g] to do; if he afterwards demur to a Replication to ſuch Plea, he ſhall be condemned if the Demurrer be adjudged againſt him, and the Indictment or Appeal be good.

Sect. 6. But howſoever the Law may ſtand in Relation to a [h] Generall Demurrer concluding in Bar of an Appeal, or Indictment, as in Common Demurrers in Civil Actions, or a Demurrer to a Plea in Bar, [i] which admits the Fact, or to a * Replication to ſuch a Plea: It hath been adjudged, That if an Appellee demur in Law to an Appeal by Reaſon of the [k] Inſufficiency of the Declaration, or generally demur to the Declaration, with a [l] Concluſion *& petit judicium de narratione illa & quod narratio illa caſſetur*; or having prayed [m] *Oyer* of the Writ and Proceſs, demand Judgment of the Appeal, *quia dicit quod breve de appello prædict. & proceſſ. inde minus ſufficient' in lege exiſtunt ad ipſum W. C. ad dictum breve de App.llo reſpondere compellend' & hoc parat. eſt verificare prout Cur', &c. unde petit judicium de brevi de Appello prædict. & petit inde allocationem, & quod breve illud de Appello caſſetur*; ſuch Demurrer ſhall not conclude him from pleading over to the Felony, either at the ſame Time [n] with the Demurrer, or [o] after it ſhall be adjudged againſt him.

Sect. 7. But it ſeems, That in Criminal Caſes not Capital, if the Defendant demur to an Indictment, *&c.* whether in Abatement or otherwiſe, the Court will not give Judgment againſt him to anſwer over, but final [p] Judgment; for it ſeems, That in ſuch Caſes there can be no Demurrer properly in Abatement, except [q] it be to a Plea in Abatement, or to a [r] Replication to ſuch a Plea.

Sect. 8. A Demurrer to an Appeal hath been [s] received after Iſſue joined: But it hath been adjudged, [t] That a Demurrer to an Indictment ought not be received after Verdict.

[a] Bro. Peremptory, 86. [b] S. P. C. 150. Lett. C. [c] 2 Inſt. 178. [d] H. P. C. 243.

[e] Bro. Demurrer, 17. [f] Bro. Peremptory, 86.

[g] Vide ſupra, Ch. 23. Sect. 135.

[h] *See the precedent Section.* [i] Vide Bro. Peremptory, 86. Fitz. Coro. 12. * Vide Bro. Perempt. 86. [k] Dyer 38. pl. 51. 39. pl. 65. Cro. Eliz. 196. pl. 13. [l] *As it was done in the Caſe of* Smith *and* Bowen. Mich. 7. Ann. Vid. Salk. 59. pl. 2. [m] *As it was done in the Caſe of* Widdrington *and* Charlton, Hill. 10 Ann. [n] Smith *and* Bowen, Mic. 7 Annæ. *In which Caſe the Demurrer was continued on the Record with a* Ceſſet. triatioexitus, 38. pl. 51. 611. [o] Cro. *be Law.*

&c. *and after the Demurrer was determined againſt the Defendant, a* Venire *was awarded.* [p] Dyer, Salk 59, 60. Cro. E. 196. pl. 13. [q] Vide Salk. 220. [r] Salk. 218. [s] Ra. Entr. 160. pl. 1, 2, 3. E. 196. pl. 13. [t] 1 Sid. 208. *wherein the Precedent in* Co. Ent. 363. b. *to the contrary is denied to*

CHAP.

CHAP. XXXII.

Of Sanctuary.

BEFORE I consider in the third Place, how a Prisoner is to be demesned upon his Pleading; I shall examine the Nature of the several Kinds of Pleas in Criminal Cases, which are either,

1. Dilatory, or,
2. In Chief.

Dilatory Pleas are either,

1. Declinatory, or,
2. In Abatement.

Declinatory Pleas are either,

1. Of the Privilege of Sanctuary, or,
2. Of the Benefit of the Clergy.

Sect. 1. As to the Plea of the Privilege of Sanctuary, the Learning relating to it being made is a great Measure useless by the Statute of 21 *Jac.* 1. 28. *Par* 7. by which it is enacted, *That no Sanctuary or Privilege of Sanctuary shall after that Time be admitted or allowed in any Case.* I shall but briefly consider it under the following Heads,

1. What was the Nature of the Privilege of Sanctuary.
2. What Authority was necessary for the creating it.
3. To what Matters it extended.
4. At what Time and in what Manner it was to be pleaded.

Sect. 2. As to the first Point, *viz.* What was the Nature of the Privilege of Sanctuary: It seems to be agreed, [a] That so far as a Place was allowed to have it, it gave all those who fled to it for Safeguard, and continued within its [b] Precincts, a [c] Freedom from being apprehended, or compelled to answer in any Court of Justice, and a Right to be remanded, if taken out against their Will.

[a] Finch of Law, 374. S. P. C. 108. Lett. B.

[b] *What those Precincts were* Keilw. 189. a. b. 191. 9 H. 7. 20. pl. 15. S. P. C. 113. a. Bro. Sanctuary, 10.

[c] Keilw. 188, 189, 190, 191. 8 H. 6. 4. b. *Abridged* Fitz. Coro. 5. 1 H. 7. 23. b. *Abridged* Fitz. Coro. 49. 9 E. 4. 28. b. *Abridged* Fitz. Coro. 32. Keilw. 107, 188.

Sect. 3. As to the second Point, *viz.* What Authority was neceſſary for the creating it: It ſeems, that it belonged of Common [a] Right to every Church and Churchyard, for the Space of Forty Days, but could not be claimed for a longer Time, either by Force of any Bull from the [b] Pope, nor even by [c] Preſcription, ([d] eſpecially in the Caſe of High Treaſon) but only by a Grant [e] from the King, made, or at leaſt confirmed [f] or allowed [g] in *Eyre*, ſince the Time of Memory. But it is ſaid, That it did not gain *the Name of a Sanctuary till it had the Pope's Bull, tho' it had the † full Privilege of one, as to all Exemption from Temporal Courts, by the King's Grant only.

Sect. 4. As to the third Point, *viz.* To what Matters it extended. It ſeems agreed, That it never was any farther a Protection againſt any Action merely Civil, [h] than to ſave the Defendant from Execution of his Body. Alſo it ſeems to be generally agreed, That if it were granted by general Words, it extended not to [i] High Treaſon. But it ſeems agreed, [k] That in ſuch Caſe it extended to all Felonies except [l] Sacrilege, and to all inferior Crimes, except ſuch as were committed by a Sanctuary Man [m] within the Sanctuary, or even [n] out of it, *ſub ſpe redeundi.*

Sect. 5. As to the fourth Point, *viz.* At what Time, and in what Manner it was to be pleaded: It ſeems agreed, That the Defendant loſt the Benefit of it, unleſs he pleaded it before any [o] other Plea, and properly made out his Caſe; but for this Matter I ſhall wholly refer the Reader to the Old [p] Books.

Sect. 6. For the learning of Abjuration, [q] depending much upon that of Sanctuaries, and ſeeming to be of very little Uſe at this Day, I ſhall refer to *Staundforde's Pleas of the Crown, Book* 2. *Chap.* 40. and to what hath been ſaid already concerning that Matter, in the Chapter concerning *Coroners, Sect.* 44.

[a] 32 H. 8. ch. 12. Finch of Law 388. 3 H. 7. 12. pl. 6. *Abridged* Fitz. Coro. 54. 21 E. 3. 17. pl. 21. *Abridged* Bro. Sanctuary, 2. Supra Ch. 9. Sect. 44. Keilw. 189. a. Bro. Sanctu. 11, 14, 16. Raſt. Entr. 583. pl. 1, 2. [b] Keilw. 189, 190, 191. S. P. C. 110. b. 111. Lett. A. Bro. Sanctu. 6. 15. 5 Co. de jure Regis eccleſ. 26. [c] 1 Inſt. 114. Keilw. 188, &c. *But Quære if ſuch Preſcription were confirmed by King, or allowed in* Eyre *ſince Time of Memory.*

Keilwey, 188, 189, 190, 191. [d] S. P. C. 112. a. 1 H. 7. 23, 25, 26. *Abridged* Fitz. Coro. 49. Preſcription, 20. Vide Ra. Entr. 584. pl. 3, 4, 5. [e] S. P. C. 108. Lett. B. 110, 111. 1 H. 7. 25. b 26. Bro. Sanctuary, 7. Keilw. 189, 190, 191. [f] Keilw. 189, 190. 1 H. 7. 23. 2 Rol. Abr. 268, 269. [g] Keilw. 189, 190. 2 Rol. Abr. 268, 269. 1 H. 7. 23. Bro. Sanctuary, 7. 15. *this is made a Quære.* S. P. C. 112. * Finch of Law, 375. † Finch of Law, 374, 375. [h] Bro. Sanctuary, 3, 11. 7 H. 6. 8. pl. 34. *Abridged* Fitz Juriſdiction, 2. Dyer. 295. pl. 11, 12. [i] 21 E. 3 17. pl. 21. *Denied*, 29 Aſſ. pl. 24. *Abridged*, Fitz. Grant, 77. Bro. Sanctuary, 6. 1 H. 7. 23, 25, 26. *Abridged* Fitz. Coro. 49. Preſcription, 20. Cont. Keilw. 190, 191. *Quære* Finch, 374. [k] *See the Books cited to the other Parts of this Section. Quære if in ſuch Caſe it extended to Petit Treaſon.* Bro. Sanctuary, 2. [l] 3 Inſt. 115. Fitz. 420. [m] *Agreed by all the Canoniſts*, Keilw. 191 b. [n] *Denied by many of the Canoniſts*, Keilw. 191. b. [o] S. P. C. 113. Lett. B. Fitz. Coro. 438. Bro. Sanctuary, 5. 21 E. 3. 17. pl. 21. *Abridged* Bro. Sanctuary, 2. Fitz. Coro. 447. 9 E. 4. 28. b. *Abridged* Fitz. Coro. 32. [p] Keilw. 90, 107, 188, 189. S. P. C. 113. a. 1 H. 7. 23, 24, 25, 26. 9 H. 7. 20. pl. 15. Ra. Ent. 584, pl. 3, 4, 5. 683. pl. 3. [q] 3 Inſt. 115. Fitz. Aiel, 5.

CHAP.

CHAP. XXXIII.

Of Clergy.

FOR the better understanding the Nature of the Benefit of the Clergy, (or rather of the [a] Statute at this Day) I shall endeavour to shew,

[a] *See the latter Part of this Chapter.*

1. By what Kind of Persons it is demandable.
2. For what Crimes.
3. At what Times.
4. Whether it shall be allowed where it is not demanded.
5. Who is to judge whether the Person who demands it have a Right to it or not.
6. How far the Ordinary was punishable at Law for demanding or refusing a Clerk against Law.
7. In what Manner at the Common Law a Clerk was to be delivered to the Ordinary, and what is be done to him afterwards.
8. What is to be done to him at this Day, and how far it shall be to his Benefit.

Sect. 1. As to the first Point, *viz.* By what Kind of Persons the Benefit of the Clergy, (or rather of the Statute at this Day) is demandable: It may not be improper to look a little back into the Original of it, whereby we shall find, That anciently the Clergy [b] strongly insisted, that by the Law of God their Persons were so sacred, that they could not, without a Violation of that Law, be convened before, and much less punished with the Loss of Life or Member by any secular Judge, for any Crime whatever. But there seems to be so little [c] Colour for any Pretence of this Kind from Scripture, that I almost wonder how it was possible that any Persons could be so far prejudiced, as seriously to be persuaded that it is deducible from thence.

[b] Keilw. 181, 182, 183, 184, 185.

[c] Keilw. 181, &c.

Sect. 2. But it seems agreed, [d] That all Persons in Holy Orders, have this Privilege by the Canon Law; but this Law being no farther in [e] Force here than as it hath been received, and is consistent with the Common or Statute Law; it will be proper to shew how far it hath

[d] *See* Lyndw. *Book* 2. *in the Chapter* De foro Competente Kely. 99, 100, 101. Keilw. 180, 5 Co. de jure &c. S. P. C. 123, 124. Regis eccles. 13, &c.

[e] Keilw. 181, &c. Kely. 99, &c. Finch of Law, 462, 463.

been received, and is consistent with those Laws; which I shall at present consider under this Head, so far as it relates to the Persons intitled to this Privilege; and shall farther consider it as to other Matters, in the following Part of this Chapter.

Sect. 3. It seems agreed, That before the Statute of *Articuli cleri, Ch.* 15. made in the ninth Year of *Edw.* 2. it was [a] generally denied to those who had abjured, or who had any other way confessed themselves Guilty: But by a favourable Interpretation of that Statute, which expresly extends only to those who fly to the Church for Safeguard, it hath been allowed [b] to all those who have confessed themselves guilty, upon their Arraignment or otherwise, in the same Manner as if they had not confessed.

Sect. 4. Also it seems, That notwithstanding the Clergy [c] contended That the Word *Clericus* (which is the Word generally used by the [d] Canon Law as well as ours, [e] to express those who are intitled to this Privilege) did include those of the Inferior Orders,* as well as Bishops, Priests and Deacons: Yet it seems, [f] That the Temporal Judges sometimes denied it to those in Inferior Orders, as well as to mere [g] Laymen, before the Statute of 25 *E.* 3. *Ch.* 4. which reciting, *That the Prelates had grievously complained, That secular Clerks, as well Chaplains, as other Monks, and other People of Religion, had been drawn and hang'd by Award of the secular Justices, in prejudice of the Franchise of Holy Church,* &c. *doth enact, That all Manner of Clerks, as well Secular as Religious,* &c. *shall freely enjoy the Privilege of Holy Church,* &c.

Sect. 5. It seems that by a favourable Interpretation of this Statute, which universally prevailed soon [h] after it was made, not only those actually admitted into some inferior Order of the Clergy, [i] but also those who were never qualified to be admitted into Orders, (which was tried [k] by putting them to read a Verse) have been taken to have a [l] Right to this Privilege, as much as Persons in Holy Orders, whether they were Persons lawfully born, or †Bastards, [m] Aliens or Denizens, in the Communion of the Church or [n] Excommunicate, within the Common Benefit of the Law, or ‖ Outlaws, *&c.* so that they were not [o] Hereticks convict, nor [p] Jews, Mahometans, nor Pagans; nor under [q] a perpetual Disability of going into Orders, admitting of no Dispensation, as [r] blind and maimed Persons formerly were, and Women [s] still are; nor liable to the Objection of Bigamy, *viz.* (of having [u] married two different Women successively, or a Widow) which by a Constitution of the Council of *Lyons,* [x] received in this Kingdom, was a Bar to the Demand of the Privilege of the Clergy; and by Force of 18 *E.* 3. 2. was triable by the Certificate [y] of the Bishop.

Sect. 6. But it is expresly enacted by 1 *E.* 6. 12. *Par.* 16. *That any Person who by the Law of this Realm ought to have the Benefit of his Clergy, shall be admitted to it, altho' he have been divers Times married to any single Woman*

[a] Fitz. Coro. 155. 11 Co. 29. b. S. P. C. 124. Lett. G. Vide Keilw. 186. b. Seldon's Janus Anglor'. *Ch.* 10.

[b] Bro. Clergy, 3, 7, 8. 9 E. 4. 28. pl. 40. 8 H. 4, 3. pl. 5. 1 Ass. pl. 4. 27 H. 6, 7. b. Fitz. Coro. 191.

[c] Kely. 99, 100.

[d] Lyndw. B. 2. *in the Chapter* De foro competente.

[e] *See the Statute of* Marlb. Ch. 28. *and* Westm. 1. Ch. 2. *and* Articuli cleri, Ch. 15. *and the Old Books cited,* 2 Inst. 633, 634 &c.

* Keilw. 181, Kely. 99, 100.

[f] Kely 99, 100.

[g] Fitz. Coro. 233. *But they sometimes allowed it to mere Laymen, being able to read.* Fitz. Coro. 117.

[h] *Yet it was holden the next Year after the Statute* quod literatura non facit clericum nisi habeat sacram tonsuram. 26 Ass. pl. 19. *Abridged* Fitz. Coro. 191.

S. P. C. 124. Lett. B. [i] Kely. 100, 101, 102. Bro. Clergy, 7, 20. [k] Kely. 100, 101. Finch, 462, 463.

S. P. C. 133. Letters A. B. C. D. 34 H. 6. 49. pl. 16. Fitz. Coro. 44. *See the Cases cited to the fourth general Point of this Chapter.* [l] 9 E. 4. 28. pl. 40. *Abridged* Bro. Clergy, 7. † Bro. Clergy, 22. [m] Bro. Clergy, 20.

[n] Bro. Clergy, 20. H. P. C. 229. 11 Co. 29. b. ‖ *See* 3 & 4 W. & M. 9. 11 Co. 29. b. [o] S. P. C. 133.

Lett. B. Bro. Clergy, 20. 11 Co. 29. b. [p] Bro. Clergy, 20. 11 Co. 29. b. H. P. C. 229. [q] 11 Co. 29. b.

[r] 11 Co. 29 b. H. P. C. 229. Cont. Bro. Clergy, 21. [s] Finch, 463. 11 Co. 29. b. *See the Preambles of* 21 Ja. 1. Ch. 6. and of *the Clergy.*

[u] S. P. C. 134, 135. Ra. Ent. 106. a. b. [x] *See the Statute of Bigamy,* 4 E. 1. Ch. 5. 5 Co. De jure Regis ecclesiastico, 13. S. P. C. 125. Lett. F. [y] Ra. Ent. 160. a. b. S. P. C. 134, Lett. C. 135. 2. 11 H. 4. 11. pl. 24. *Abridged* Fitz. Coro. 85. 40 E. 3. 42. pl. 23. *Abridged* Fitz. Attorney, 39.

Yet 'tis admitted Fitz. Coro. 461. *That a Woman might claim the Benefit of*

or single Women, or to any Widow or Widows, or to two Wives or more. But it bore some [z] Question whether this Statute were not impliedly repealed by 1 & 2 *Ph. & Ma.* 8. while it stood in Force, *Which repealed all Clauses, &c. against the See of* Rome.

[z] Vide S.P.C. 134.b Dalis. 21. pl. 1. Dyer 201 pl. 67. Bro. Clergy, 20. H. P. C. 229.

Sect. 7. As to Women it was enacted by 21 *Jac.* 1. 6. *That on a Conviction of Grand Larceny under the Value of* 10 s. *being no Burglary, nor Robbery in or near the Highway, nor a felonious private taking from the Person, &c. but only such an Offence for which a Man might have his Clergy, they shall be burnt in the Hand, and imprisoned, &c.*

Sect. 8. But it is enacted by 3 & 4 *W. & M.* 9. Pat. 7. *That where a Man being convicted of any Felony may demand the Benefit of his Clergy; if a Woman be convicted for the same, or the like Offence, upon her Prayer to have the Benefit of this Statute, Judgment of Death shall not be given against her upon such Conviction, or Execution awarded upon any Outlawry for such Offence, but she shall suffer the same Punishment as a Man should suffer, that has the Benefit of his Clergy allowed him in the like Case; that is to say, shall be burnt in the Hand by the Gaoler in open Court, and farther be kept in Prison for such a Time as the Justices in their Discretion shall think fit, so as the same do not exceed one Year's Imprisonment.*

Sect. 9. It seems, [a] That one who had been guilty of Sacrilege, or of breaking the Prison of the Ordinary, had no Right to the Benefit of the Clergy, but at the [b] Discretion of the Ordinary.

[a] S. P. C. 31. Lett. F. 32. Lett. A. 123. Lett. D. 124. Lett. A. 133. Lett. B. Fitz. Coro. 112, 117, 120, 250, 257. 4 Inst. 314. 12 Ass. 39. *Abridged* Bro. Clergy, 10. 17 Ass. pl. 4. 17 E. 3. 13. pl. 47. *Abridged* Fitz. Coro 112. 9 E. 4. 28. pl. 40. *Abridged* Bro. Clergy, 7. 27 Ass. 42. *Abridged* Fitz. Coro. 205. Bro. Clergy, 13. 11 Co. 29. b.

Sect. 10. It seems clear, [c] That before the Statute of 4 *H.* 7. 13. He who had been admitted to the Benefit of the Clergy, might have it a second Time as well as the first, unless he had broken the Prison of the Ordinary, to which he was committed when the Clergy was first allowed him; in which Case it seems, [d] That he could not save himself from a second Prosecution, tho' for the very same Felony for which he was before convicted, unless he could shew a Purgation.

Sect. 11. But it is enacted by 4 *H.* 7, 13. *That every Person, not being within Orders, who hath once been admitted to the Benefit of his Clergy, estsoons arraigned of any such Offence, be not admitted to have the Benefit or Privilege of the Clergy, &c. And it is provided, That if any Person at the second Time of asking his Clergy, because he is within Orders, hath not there ready his Letters of his Orders, or a Certificate of his Ordinary, witnessing the same: That then the Justices afore whom he is so arraigned, shall give him a Day by their Discretion to bring in his said Letters or Certificate; and if he fail, and bring not at such a Day his said Letters or Certificate, then the Person to lose the Benefit of his Clergy as he shall do that is without Orders.*

[b] *Yet it seems to be holden* 26 Ass. pl. 19. and 27. *Abridged* Bro. Clergy, 11, 12. Fitz. Coro. 191, 193, *That one who had been guilty of Sacrilege might demand it as well as any other. And it seems to be holden* Fitz. Coro. 232, 250, 419. *That one who had broken the Prison of the Ordinary had no manner of Right to it.* Vide 12 Ass. 39. *Abridged* Bro. Clergy, 10. *This Point is made a Quære* 9 E. 4. 28. pl. 40. *Abridged* Bro. Clergy, 7. [c] H. P. C. 230. S. P. C. 31. Lett. F. 32. Letter A. 107. Letter B. 124. Letter C. 135. Letters B D. *See the Preamble of* 4 H. 7. 13. *But* 17 Ass. pl. 4. 17 E. 3. 13. pl. 47. *Abridged* Fitz. Coro. 112. *It seems to have been doubted where the Clerk was attainted before he first had the Benefit of the Clergy.* [d] Fitz. Coro. 232. *and to the Books cited to Letter C. and to the former Section.*

Sect.

Sect. 12. But it is enacted by 28 *H.* 8. *Par.* 7. *That Persons within Holy Orders, shall be under the same Pains and Dangers for the Offences referred to by that Statute, and be used and ordered to all Intents and Purposes, as other Persons, not being within Holy Orders. And it is farther enacted by* 32 H. 8. 3. Par. 8. *That Persons within Holy Orders who shall be admitted to their Clergy, shall be burnt in the Hand in like Manner as lay Clerks, and shall suffer and incur all such Pains Dangers, and Forfeitures, and be ordered and used for their Offences of Felony, to all Intents, Purposes and Constructions, as Lay Persons admitted to their Clergy, be, or ought to be,* &c.

Sect. 13. But it is enacted by 1 *E.* 6. 12. *par.* 10. That in all Cases of Felony, other than those in that Act mentioned, every Person who shall be found Guilty, or confess, or stand Mute, or not answer directly, shall have the Benefit of his Clergy, in like Manner and Form as before the first Year of King *Henry* VIII. And therefore it seems plain, That where Lay Persons are not excluded from the Benefit of the Clergy the first Time 3 Persons in Holy Orders may have it as often as they want it, in the same Manner as they might upon the Foot of the said Statute of 4 *H.* 7. 13. [a] except they shall be outlawed, or challenge above the Number of twenty, in which Case they are not within the Purview of 1 *E.* 6. which extends only to those who shall be found Guilty, or confess, or stand Mute, *&c.* But [b] where the Crime itself charged against a Person in Holy Orders, is by any Statute generally excluded from the Clergy, such Person shall no more have the Benefit of it than if he were a mere Layman.

[a] H. P. C. 238, 239. S. P. C. 135. Letter B.

[b] S. P. C. 135. Let. D. 136. H. P. C. 235, 236.

Sect. 14. It is recited by 34 *&* 35 *H.* 8. 14. *That divers Persons had been indicted and attainted, and some of them Clerks convict, and some of them Clerks attainted,* &c. *before Justices of Peace, Gaol-Delivery,* &c. *within divers Cities, Counties and Franchises,* &c. *the Records of which Attainders and Convictions often, by Negligence of the Clerks,* &c. *having the Rule and Keeping thereof, had been imbezilled, and not ready to be objected against such Persons, being newly arraigned before other Justices,* &c. *And for that it had not been known certainly whether to resort for the same Records, because they were not certified into any Place certain, such Offenders had often had the Benefit of the Clergy where they ought not,* &c. And thereupon it is enacted, *That the Clerk of the Crown, Clerks of the Peace, and Clerks of Assise, where any such Attainder, or Conviction shall be so had, shall certify a Transcript, briefly containing the Effect of every such Indictment,* &c. *and Clerk attainted,* &c. *that is to say, the Name, Surname, and Addition of every such Person,* &c. *and the Certainty of the Offence,* &c. *and the Day and Place of his Attainder or Conviction,* &c. *and the Day and Place of his Offence,* &c. *before the King in his Bench at* Westminster, *there to remain of Record for ever, within forty Days after such Attainder,* &c. *if the Term be then, and if not, then within twenty Days after the next Term,* &c. *on Pain of* 40 s. &c. *And that the Clerk of the Crown in the King's Bench, shall receive the same without Fee, under the like Pain.*

Sect. 15. *Provided, That if there be more Persons contained in any such Indictment, other than such Person so attainted or convicted, that then such Clerk shall certify such Transcript only* [c] *concerning the Persons or Persons so attainted or convicted, which shall be as effectual against such Person and Persons against whom it shall be so objected, alledged or pleaded, as if the very Record were present.*

[c] Note, *That this is omitted in* Keble's *Statutes.*

Sect. 16. And it is farther enacted, *That the said Clerk of the Crown in the King's Bench, shall at all such Times as the Justices of the Gaol-Delivery, or Justices of the Peace, in every County within this Realm of* England, *do write unto him for the Names of such Persons, which be so attainted, or convict, and certified in the said Bench, shall incontinently certify the said Names and Surnames of the said Persons, with the Causes why and wherefore they were convicted or attainted, unto the Justices of Gaol-Delivery, or Justices of the Peace,* &c. *on Pain of* 40 s.

Sect. 17. But it is provided, *That this Act shall not extend to the Clerks of the Crown,* &c. *in* Wales, *or* Chester, *or Counties-Palatine of* Lancaster *and* Durham, *to make any Transcript of any such Attainder or Conviction, before the King's Justices of his Counties in* Wales, &c.

Sect. 18. It seems, [a] That the Justices may, by Force of this Act, write in their own Names to the Clerk of the Crown in the King's Bench, for a Certificate of the Transcript of an Attainder or Conviction, and need not do it by Writ in the King's Name under their *Teste, &c.* which is required [b] by the Construction of 2 & 3 *E.* 6. 24. where the Justices of one County write to those of another for the Certificate of the Attainder, or Acquittal of the Principal, in order to proceed against the Accessary. And the Reason of the Difference is, because in this last Case Justices write to Justices, but in the former to an Officer only.

[a] Dy. 253, pl. 103.

[b] Vide Sup. Ch. 29. Sect. 53.

Sect. 19. It is farther provided by 3 & 4 *W.* & *M.* 9. *Par.* 8. as followeth, *Forasmuch as such Men and Women who have once had their Clergy,* &c. *may happen to be indicted for an Offence committed afterwards in some other County, Be it therefore enacted, That the Clerk of the Crown, Clerk of the Peace, Clerk of the Assises where such Man or Woman shall be convicted, shall, at the Request of the Prosecutor, or any other in their Majesties Behalf, certify a Transcript briefly, and in few Words, containing the Effect and Tenor of every Indictment and Conviction of such Man or Woman, of his or her having the Benefit of the Clergy,* &c. *and Addition of every such Person or Persons, and the Certainty of the Felony and Conviction, to the Judges and Justices in such other County where such Man or Woman shall be indicted, which Certificate being produced in Court, shall be sufficient Proof that such Man or Woman have before had the Benefit of Clergy,* &c.

As to the second Point, *viz.* For what Crimes the Benefit of the Clergy, or rather of the Statute may be demanded, I shall premise,

Sect. 20. *First,* That it seems to be generally agreed, That by the Common Law it is demandable as well upon an [c] Appeal as Indictment, for any Crime whatsoever, which subjects the Offender to the [d] Loss of Life or Member, except [e] High Treason, (whether against the King's Person or [f] not,) and Sacrilege; for the first of which the Common Law seems to give the Offender no manner of Right to the Benefit of his Clergy, and for the latter to have it left to the Discretion of the Ordinary, as hath been more fully shewn, *Sect.* 9.

[c] 11 Co. 29. b.

[d] S. P. C. 124. Lett. E. Bro. Clergy, 19. Finch of Law 462, 463.

[e] S. P. C. 124. Lett. E. Fitz. Coro. 283. 19 H. 6. 47. pl. 103. *Abridged* Fitz. Coro. 8. Bro. Clergy, 6. Vide 2 Inst. 634.

[f] *So it appears from the Books cited to Letter* E. *Yet* H. P. C. 330. *and* 11 Co. 29. b. *and* Bro. Clergy, 25, 31. *it seems to be holden, That by the Common Law Clergy was excluded from such High Treason only as was against the Person of the King. But* Quære *upon what Ground this is holden. And see* 25 E. 3. De Clero, ch. 5.

Sect. 21. *Secondly*, That it ſeems to be doubtful, [a] whether it were demandable at the Common Law for Petit Treaſon; but this was ſettled by 25 *E.* 3. *de clero*, *Ch.* 4. which expreſsly allows it for *any Treaſons*, *or Felonies*, *touching other Perſons than the King himſelf*, *or his Royal Majeſty*.

Sect. 22. *Thirdly*, That after this a Conſtruction [b] prevailed, That Clergy might be denied to Felons charged as *inſidiatores viarum*, *& depopulatores agrorum*, but this is remedied by 4 *H.* 4. 2.

From theſe Premiſſes it ſeems to be generally agreed, [c] That the following Concluſions neceſſarily follow;

Sect. 23. *Firſt*, So far as a Perſon, who in Reſpect of his Orders or Learning, or otherwiſe, is qualified to be admitted to the Benefit of the Clergy, is denied it in Reſpect of his [d] Crime, not amounting to High Treaſon or Sacrilege; ſuch Denial muſt be grounded on ſome Act of [e] Parliament, made ſince 25 *E.* 3.

Sect. 24. *Secondly*, Where-ever an Offence is made Felony by Statute, it [f] ſhall have the Benefit of the Clergy, unleſs it be expreſsly excluded from it.

Sect. 25. *Thirdly*, Where-ever a Perſon is denied the Benefit of the Clergy, in Reſpect of a Statute, excluding it from the Crime charged againſt him, the [g] Indictment or Appeal, and the [h] Evidence thereon, muſt expreſsly bring his Caſe within the Words of ſuch Statute: And therefore, if a [i] Murder be not expreſsly laid, and proved to have been done of Malice prepenſe; and the Offence of an Acceſſary [k] before, to have been done maliciouſly; and that of a [l] Cut-purſe *clam & ſecrete a perſona*, *&c.* the Offender ſhall have his Clergy. And agreeably hereto it hath been adjudged, [m] That an Indictment of Robbery *in quadam via Regia pedeſtri ducent' de* London *ad* Iſlington, ſhall not ouſt the Offender of the Benefit of his Clergy; becauſe the Words of the Statutes [n] to this Purpoſe are *In*, *or about*, *or near the Highway*. Yet it hath been adjudged [o] That an Indictment againſt a Man as Acceſſary to Murder before the Fact, by the Words *malitioſe excitavit*, *movit*, *& procuravit*, *&c.* is ſufficient to out the Offender of the Benefit of the Clergy, by Force of 4 & 5 *Ph. & M.* the Words whereof are *That all Perſons who ſhall maliciouſly command*, *hire*, *or counſel any Perſon*, &c. which are not expreſsly purſued in ſuch Indictment. But the counſelling another being neceſſarily included in the moving, procuring, and exciting him, which therefore are tantamount in Senſe, and different only in the Manner of Expreſſion, ſuch an Indictment is as [p] much within the Statute as if it followed the very Words. Alſo it hath been [q] adjudged, That in order to ouſt a Man of the Benefit of the Clergy by Force of a Statute, which takes it away from a Capital Offence at Common Law, there is no need that the Indictment or Appeal conclude *contra formam Statuti*, becauſe the Statute doth no way alter the Nature of the Offence, but only leaves it to its proper Judgment, and takes away a perſonal Privilege of Exemption from ſuch Judgment.

Sect. 26. *Fourthly*, A Statute excluding the Principals from the Benefit of the Clergy, doth [r] not thereby exclude the Acceſſaries before or after; Neither [s] doth a Statute, excluding the Acceſſaries, thereby exclude

[a] Vide S.P.C. 124. Lett. E. H. P. C. 230. Finch of Law 463. 11 Co. 29. b.
[b] Supra Ch. 25. Sect. 61. S. P. C. 124. Lett. D
[c] H. P. C. 230, 231.
[d] S. P. C 124, 125, *&c.* H. P. C. 232, 233, *&c.*
[e] H. P. C. 230.
[f] H. P. C. 230.
[g] H.P.C. 231. 11 Co. 37. S P. C. 114. Lett. A. 130. Lett. B.
[h] S.P.C. 130. Lett. B. Dy. 261. pl. 26. 224. pl. 30.
[i] H. P. C. 231. S. P. C. 130. Lett. B Dyer, 261. pl. 26.
[k] Vid 23 H 8. Ch. 1. 1 E. 6. 12. par. 10. H. P. C. 231. 1 And. 195. 11 Co. 37. Dyer 183. pl. 59.
[l] Vide 4 & 5 Ph. & M. 4.
[m] H P.C. 231. 8 El. Ch. 4. Moore 5. pl. 16.
[n] 23 H. 8. Ch. 1. Par. 3. 1 E 6. Ch. 12 Par. 10. 4 & 5 Ph. & M. 4.
[o] 1 And. 195.
[p] See B. 1. Ch. 32. Sect. 3.
[q] See B. 1. Ch. 30. Sect. 9.
[r] See B. 1. Ch. 3. Sect. 4. 183. pl. 59.
[s] 1 Vent. 13.

Ch. 30. Sect. 7. H. P. C. 7, 58, 231. 11 Co. *from* 29 to 36. 1 And. 195. Dyer 99. pl. 59.
See 4 & 5 Ph. & Ma. 4. 11 Co. *from* 29 to 36. Sav. 46. pl 98.

the Principals. And it seems agreed, [a] That where a Statute excludes those from the Clergy who shall be found guilty of Petit Treason, Murder, Burglary, Robbery, or any other Kind of Crimes, it shall be construed to intend only to exclude the Principals, and not Accessaries before or after, notwithstanding they are certainly in a high Degree Partakers in the Guilt of the principal Offender, as hath been more fully shewn *Chap.* 29. *Sect.* 13, 14. Yet inasmuch as such Statutes taking away a Privilege of so high a Consequence to the Subject, ought to receive the strictest Interpretation; and the Words of them may, without any manner of Strain, or Repugnance to the general Rules of Law, be taken in such a Sense as will include the Principals only, I do not know that they have ever been carried farther.

[a] H P. C. 58. 1 And. 195. Dy. 99. pl. 59. 183. pl. 59.

Sect. 27. *Fifthly*, Where Clergy is allowable, it shall be as much allowed to one who stands [b] Mute, or challenges peremptorily [c] above the Number of twenty, or is [d] outlawed, *&c.* as to one who is convicted by Verdict, or Confession, *&c.*

[b] H. P. C. 231. 25 H. 8. 3. Pa. 2. Supra, ch 30. Sect. 24. Moore 550. pl. 738. Cont. Fitz. Coro. 283. [c] 3 H 7. 12. pl. 8. *Abridged* Bro. Clergy 27. Fitz. Coro. 51. H. P. C. 231. 25 H. 8. 3. Par. 2. 3 & 4 W. & M. 9. [d] 11 Co. 29. b. *See* 3 & 4 W. & M. 9.

Sect. 28. *Sixthly*, A Statute taking the Benefit of the Clergy from those who shall be found guilty, doth not [e] thereby take it from those who stand Mute, or challenge peremptorily above the Number of twenty, or are outlawed, *&c.* But it seems [f] clear, That a Statute taking it away from those who shall be found Guilty, extends as well to those who shall confess themselves guilty upon Record, as to those who shall be found guilty by Verdict; for as the latter are found guilty by a Jury, so are the former by the Court, and their Conviction being from their own Mouths, is of the highest Nature possible.

[e] *See* 25 H. 8. 3. Par. 2. 3 & 4 W. & M. 9. [f] 11 Co. 29. a. 11 Co. Poulters Case.

Sect. 29. And now I shall endeavour to shew for what Crimes Persons are excluded from the Benefit of the Clergy by Statutes made since 25 *E.* 3. which being somewhat perplexed and intricate, I shall, for the better clearing of this Matter, first take a general View of those Statutes so far as they are in Force at this Day, and then shall more distinctly consider them, as they particularly concern the several Kinds of Capital Crimes.

Sect. 30. The first of those Statutes I shall take Notice of, is 23 *H.* 8. *Ch.* 1. by which it is enacted, *Par.* 3. *That no Person who shall be found guilty, after the Laws of this Land, for any manner of Petit Treason, or for any wilful Murder of Malice prepensed, or for robbing any Churches, Chapels, or other Holy Places, or for robbing of any Person or Persons, in their Dwelling Houses, or Dwelling Place, the Owner or Dweller in the same House, his Wife, his Children, or Servants, then being within, and put in Fear and Dread by the same, or for robbing of any Person or Persons in or near about * the Highways, or for wilfull burning of any Dwelling-Houses or Barns, wherein any Grain of Corn shall happen to be; nor any Person or Persons being found guilty of any Abetment, Procurement, Helping, Maintaining, or Counselling of, or to any such Petit Treasons, Murders or Felonies, shall be admitted to his Clergy; such as be within Holy Orders only excepted.*

* So Rastal's Statutes; but Pulton omits the Word about, and Keble the Word near.

Sect. 31. *Note*, That this Statute extends [g] as well to Appeals as to Indictments, and to those who shall confess [h], as much as to those who shall plead and be found Guilty; for the Words are general, *That no Person who shall be found guilty, after the Laws of this Realm*, &c. *shall be admitted to his Clergy*, &c. But it extends not [i] to Persons outlawed, and was easily evaded [k] by Persons brought to their Trials, by standing Mute, or challenging peremptorily above the Number of twenty, whereby they prevented their being found guilty.

[g] 11 Co. 30. b. [h] Supra Sect. 28. [i] 11 Co. 30. b. [k] *See the Preamble of* 25 H. 8. 3. *And* 11 Co. 30. b.

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Sect. 32. But these two last Defects are provided for by 25 *H.* 8. *Ch.* 3. by which it is enacted, Par. 2. *That every Person who shall from thenceforth be indicted of Petit Treason, willful burning of Houses, Murder, Robbery or Burglary, or other Felony, according to the Tenour and Meaning of* 23 H. 8. *and thereupon arraigned, and do stand Mute of Malice or froward Mind, or challenge peremptorily above the Number of twenty, or else will not, or do not answer directly to the same Indictment and Felony, whereupon he is so arraigned, shall from thenceforth lose the Benefit and Privilege of his Clergy, in like Manner and Form as if he had directly pleaded to the same Petit Treason, Murder, Robbery, Burglary, or other Felony, whereupon he is so arraigned, and thereupon had been found guilty, after the Laws of the Land.*

[a] 11 Co. 31, 32.

Sect. 33. But this Statute extends not [a] to those who are outlawed, any more than 23 *H.* 8. neither doth it extend to Accessaries before, both of which are included in 23 *H.* 8.

Sect. 34. After came the Statute of 1 *E.* 6. 12. Par. 10. *That no Person who shall be in due Form of the Laws attainted or convicted of Murder, of Malice prepensed, or of Poisoning, of Malice prepensed, or of breaking of any House by Day or by Night, any Person being then in the same House where the same Breaking shall be committed, and thereby put in Dread; or of robbing any Person in the Highway, or near the Highway; or for felonious stealing of Horses, Geldings, or Mares; or of felonious taking of any Goods out of any Parish-Church, or other Church or Chapel; or being indicted or appealed of any of the same Offences, and thereupon found guilty by Verdict of twelve Men, or shall confess the same upon his Arraignment; or will not answer directly according to the Laws of this Realm, or shall stand wilfully, or of Malice, Mute, shall not be admitted to the Benefit of his Clergy, And that in all other Cases of Felony, all Persons that shall be arraigned, or found guilty upon their Arraignment, or shall confess, or stand Mute, in Form aforesaid, or will not answer directly in Form aforesaid, shall have their Clergy in the same Manner as before the first Year of King* Henry, VIII.

[b] 11 Co. 32. b.
[c] 11 Co. 31, 32.
[d] Supra Sect. 30.
[e] Supra Sect. 32.

Sect. 35. *Note*, That this Statute extends as well to [b] Appeals as to Indictments, in which Respect it is more fully penned than 25 H. 8, And that it extends to Persons in Holy [c] Orders, as much as to Lay-men, and to all Persons attainted in general, and consequently to those who are outlawed, in which Respects it is more fully penned than either, [d] 23 or [e] 25 *H.* 8. Yet it hath several considerable Defects; as,

[f] 11 Co. 32. a. Sup Sect. 27, 28.
But S. P. C. 126 Lett. A. *it is made a Quære whether those who challenge more than twenty, are not included under the Word Convict.*
[g] *But in* 11 Co 32. a, *it seems to be otherwise holden.*

Sect. 36. *First*, In that it doth not exclude those from the Benefit of the Clergy, who challenge above the Number of twenty; so that it is easily made ineffectual [f] by taking such Challenges, as to Crimes excluded from the Benefit of the Clergy, by this Statute, and no other. But as to Crimes within 25 *H.* 1. it [g] seems plain, That a Person that takes such Challenges might be excluded from his Clergy by force of that Statute even before it was reviv'd by 5 & 6 *E.* 6. set forth more at Large *Sect.* 42, *&c.* because 1 *E.* 6. restores the Benefit of the Clergy, as it was before the Reign of *Henry* 8. to such only as shall be found guilty, or confess, or stand Mute, or not answer directly, and consequently [h] those who challenge above the Number of twenty, seem clearly to be excluded in the same Manner as if 1 *E.* 6. had never been made.

[h] Vide H. P. C. 239.

Sect. 37. *Secondly*, In that it omits Acceſſaries in the Clauſe which takes away Clergy, but includes them in that which reſtores it, which is general as to all Caſes of Felony, not mentioned in the Act, whereof any Perſon ſhall be found guilty, and conſequently as to Acceſſaries wholly takes off the Force of 23 *H.* 8. which extends [i] only to thoſe who ſhall be found guilty, and is the only Statute in this Reign which excludes Acceſſaries from the Clergy. And accordingly we find, [a] That after this Statute Acceſſaries were admitted to their Clergy, in the ſame Manner as before the Reign of *Henry* 8. till the making of 4 & 5 *Ph. & Mar.* ſet forth more at large *Sect.* 45.

[i] Vide ſupra, Sect 30, 33.
[a] 11 Co. 31. b. Dyer 133. pl. 4.

Sect. 38. *Thirdly*, In that it alſo omits Arſon in the Clauſe which takes away Clergy, but includes it in the general Words of that which reſtores it, and conſequently reintitled thoſe [b] Convict of it to the Clergy, in all Caſes but that of challenging more than twenty, till the making of 5 & 6 *E.* 6. as ſhall be more fully ſhewn hereafter.

[b] 11 Co. 31, 32, &c. Vide ſupra, Sect. 36.

Sect. 39. *Fourthly*, In that the Clauſe which ouſts Horſe-ſtealers of their Clergy is worded in ſuch a Manner as makes it doubtful whether it extend to thoſe who ſteal but one, which occaſioned the making of 2 *& 3 *E.* 6. 33. which declares, *That a Perſon felonioufly ſtealing one Horſe, Gelding, or Mare, ſhall be put from his Clergy in the ſame Manner as if he had been indicted, or appealed for ſtealing of two*, &c.

* Vide infra Sect. 61.

Sect. 40. *Fifthly*, In that the Clauſe which ouſts Houſe-breakers of their Clergy, is not worded in ſuch a Manner as fully brings their Offence under the Notion of Felony; for it is thus expreſſed, *Any Perſon who ſhall be attainted*, &c. *of breaking any Houſe by Day or Night, any Perſon being therein and put in Fear or Dread*, &c. But ſuch a Breaking, even in the Night, is no Felony unleſs it be done with an Intent to commit a Felony, which makes it Burglary; neither can it be Felony if done in the Day with any Intent whatſoever; for tho' a Felony follow, which may make the Houſe-breaking, done with an Intent to commit it, properly enough to be called felonious: Yet it ſeems, That it cannot make it become [c] a Felony, becauſe it is not reducible to any Species of Felony. And therefore the Statute muſt be ſupplied by a reaſonable Intendment, and [d] conſtrued to mean ſuch Houſe-breaking only as amounts to, or is attended with Felony.

[c] *Yet Quære, for this Matter is Doubtfully expreſſed*, S. P. C. 126. Lett. A. *and* 11 Co. 31. b. 31 a.
[d] S. P. C. 125. Lett. D. 126. Lett. A. 11 Co. 31. b. 32. a.

Sect. 41. It is [e] holden by Sir *Edward Coke*, That Piracy was reſtored to the Benefit of the Clergy by this Statute; but as to Piracy on the High Sea, the contrary hath been ſolemnly * adjudged, and confirmed by conſtant Experience, and is certainly agreeable to the [f] legal Notion of Piracy in other Caſes; which being a Capital Offence by the Civil Law only, (even after the Statute of 28 *H.* 8. 15. which altered not the Nature of the Offence, but only the Manner of the Trial) ſhall not be included in a Statute ſpeaking generally of Felonies, which ſhall be conſtrued only of thoſe Felonies which are ſuch by our Law; as thoſe Piracies are [g] which are committed in a Creek or Port within the Body of a County, but no other.

[e] 11 Co. 31. b.
* Moore 756. pl. 1044. Vide 3 Inſt. 111.
[f] B. 1. ch. 37. Sect 6, 7.
[g] B. 1. ch. 37. Sect. 11.

Sect. 42. The next general Statute relating to theſe Matters, is 5 & 6 *E.* 6. 10. which firſt recites the above-mentioned [h] Clauſe of 23 *H.* 8. concerning Clergy, and takes Notice that it was defective in omitting thoſe who rob, &c. in one County, and remove the Thing taken into another, and there are tried, &c. and that this Omiſſion was ſupplied by 25 *H.* 8. and that the ſaid Statute of 25 *H.* 8. was in this Reſpect made ineffectual by 1 *E.* 6. 12. which reſtored Clergy as it ſtood before the Reign of *H.* 8. to all the Felonies not therein mentioned; and that by Rea-

[h] Vide ſupra, Sect.

ſon of the ſaid Statute of 1 *E.* 6. divers Perſons had committed Robberies, *&c.* in one County, and after had been taken, *&c.* and tried in another, and there had their Clergy, which they would not have had if the ſaid Statute of 25 *H.* 8. had ſtood in Force; and then goes on in theſe Words, *For Redreſs whereof from henceforth to be had, be it enacted, &c. That the ſaid Act made in the ſaid 25th Year, touching the putting of ſuch Offenders from their Clergy; and every Article, Clauſe and Sentence, contained in the ſame, touching Clergy, ſhall from henceforth, touching ſuch Offences, from henceforth to be committed and done, ſtand, remain and be in full Strength and Virtue, in ſuch Manner and Form, as it did before the making of the ſaid Act in the firſt Year of the Reign of our Sovereign Lord the King that now is: Any Clauſe, Article, or Sentence compriſed therein to the contrary notwithſtanding.*

Sect. 43. It was for ſome Time a great Queſtion, Whether this Statute revived 25 *H.* 8. for the Whole, or only for ſuch Part of it which relates to Felons removing the Thing feloniouſly taken into a different County from that wherein they took it, and there tried, *&c.*? And Sir [a] *William Staundforde* inclines to the latter Opinion; becauſe the Words are, *That the ſaid Act made in the ſaid 25th Year, touching the putting ſuch Offenders from their Clergy, ſhall be revived,* &c. where the Word *ſuch* ſhall have Relation only to the Offenders mentioned before; which are thoſe who ſteal in one County, and remove the Thing ſtolen into another; and this Objection is ſtrengthened [b] by the Title of the Act, which is only this, *That ſuch as rob in one Shire and fly into another, ſhall not have their Clergy.* To which it may be added, That all Statutes which take away Clergy, are to be conſtrued ſtrictly *in favorem vitæ.* Yet it hath been adjudged [c], and is, as I take it, fully [d] ſettled, That this Statute revived 25 *H.* 8. as to every other Part of it as well as that concerning Felons carrying the Thing ſtolen from one County into another; for granting that the Makers of the Statute of 5 & 6 *E.* 6. had the Caſe of ſuch Felons principally in their View; which appears pretty plainly, not only from the Title of the Statute, but alſo from the Preamble and Purview, for the Preamble expreſsly takes Notice of no other Miſchief from the Repeal of 25 *H.* 8. but only this, That thereby many of ſuch Felons had their Clergy; and then follows the enacting Clauſe, which begins in theſe Words, *For Redreſs whereof,* and then goes on, *be it enacted,* &c, *That* 25 *H.* 8. *touching ſuch Offenders, and ſuch Offences, remain in full Force.* Yet conſidering that the Statute of 5 & 6 *E.* 6. begins with a Recital of the whole Clauſe of 23 *H.* 8. wherein there are ſeveral other Offences contained, and that the Words, *Such Offenders, and ſuch Offences* in the enacting Clauſe of 5 & 6 *E.* 6. may properly enough refer to them, as well as to the Offence of the Felons mentioned next immediately before: And farther conſidering that the Words, *Such Offenders and ſuch Offences,* may properly enough be taken to include *all ſuch in Miſchief, and ſuch in Inconvenience,* according to the received [e] Conſtruction of the Word *ſuch,* in ſome other Statutes, and *a fortiori,* thoſe in greater Miſchief and greater Inconvenience, as almoſt all the other Offences ſpecified in 25 *H.* 8. are, as for inſtance, Petit Treaſon, Murder, Arſon, *&c.* and it is a received [f] Conſtruction of penal Statutes, to extend them to all Caſes that come within the Meaning of the Words. And it would be abſurd to imagine that the Makers of the Statute intended to put thoſe who carried Goods ſtolen into a different County, in a worſe Caſe in ſuch County than in that wherein they ſtole them, as they muſt be if 25 *H.* 8. were only revived againſt them where they carried the Thing ſtolen into a different County;

[a] S. P.C. 128. Lett. A.

[b] Vide 11 Co. 33. a.

[c] 11 Co. 33, 34, 35.

[d] H. P. C. 232 *to* 237. *Sei* Raſtal's *Statutes, Title* Clergy, Par. 16.

[e] 11 Co. 33. b.

[f] 11 Co. 33, 34. Vide ſupra, Sect. 25. *and* B. 1. ch. 32. Sect. 3.

County; for by such a Construction they would have been excluded from the Clergy, in the County wherein they committed the Robbery by 1 *E.* 6. 12. only, which not extending to those who challenge above the Number of twenty, might easily be evaded; whereas in a different County they would be excluded from it in such Case, by 25 *H.* 8. To which may be added, [a] That the first Sentence of the Purview of 5 & 6 *E.* 6. *viz. That the said Act of* 25 *H.* 8. *touching the putting such Offenders from their Clergy.* had been sufficient if no more had been intended but the excluding those who rob in one County and fly into another; and therefore it is most natural to intend that it was the Meaning of the Makers of the Statute, by adding those farther Words, *That every Article, Clause, and Sentence in the same, touching Clergy, shall touching such Offences, remain,* &c. to revive the whole Statute so far as it related to Clergy.

[a] 11 Co. 34.

Sect. 44. And since the whole Statute of 25 *H.* 8. is revived, it follows by a necessary Consequence, That so much of 23 *H.* 8. also as is expresly affirmed by it, is revived also. And therefore since 25 *H.* 8. having recited the Clause of 23 *H.* 8. concerning Clergy, and the Mischief that it extended only to those who are found Guilty, expresly enacts, *That whoever shall be indicted of Petit Treason, willful burning of Houses, Murder, Robbery, or Burglary, or other Felony, according to the Tenour and Meaning of the said Statute, and stand Mute, or challenge peremptorily above twenty,* &c. *shall lose the Benefit of the Clergy, in like Manner as if he had pleaded, and been found guilty*; whereby it affirms and inforces the 23 *H.* 8. as to those found guilty of such Crimes; it follows by a necessary Consequence, That Persons not in Holy Orders found guilty of Petit Treason, or [b] Arson, which were omitted by 1 *E.* 6. are excluded from the Clergy by 23 *H.* 8. thus affirmed and enforced by 25 *H.* 8, and consequently revived by 5 & 6 *E.* 6.

[b] 11 Co. 34, b. 35. a. H. P. C. 232, 233. Cont: Savil 46. pl. 98. S. P. C. 125.

Sect. 45. But it is observable, That the said Statute of 25 *H.* 8. wholly omits [c] Accessaries, as well as 1 *E.* 6. But to remedy this Defect, it is enacted by 4 & 5. *Ph.* & *M.* 4. *That every Person that shall maliciously command, hire, or counsel any Person or Persons, to commit or do any Petit Treason, willful Murder, or to do any Robbery in any Dwelling-House or Houses, or to commit or do any Robbery in or near the Highway in the Realm of* England, *or in any other the Queen's Dominions, or to commit or do any Robbery in any Place within the Marches of* England *against* Scotland, *or willfully to burn any Dwelling-House, or any Part thereof, or any Barn then having Corn or Grain in the same, that then every such Offender, being outlawed thereof, or being thereof arraigned and found guilty by the Order of the Law, or being otherwise lawfully attainted or convicted of the same Offence; or being arraigned thereof, do stand Mute of Malice or froward Mind, or do challenge peremptorily above the Number of twenty Persons, or will not answer directly to such Offence, shall not have the Benefit of his Clergy.*

[c] Vide supra, Sect. 33.

Sect. 46. It is observable, 1. That this Statute is general as to all Robberies in any Dwelling-House: Yet it seems to have been always taken as a [d] reasonable Construction, That it shall be restrained to such Robberies of this Kind as were excluded from the Benefit of the Clergy, by some former Statute; for it cannot be well imagined that the Makers of this, or any other Statute, intended in any Case to take away Clergy from the Accessary, where the Principal is left to the full Benefit of it.

[d] 11 Co. 35, 36, 37. Vide H. P. C. 235, 236, 237. Cont. Savil, 46. pl. 98.

Sect. 47. 2dly, That an Indictment, or Appeal, in order to ouſt an Acceſſary of his Clergy by force of this Statute, muſt expreſsly purſue it, in Subſtance [a] at leaſt, as hath been already ſhewn, *Sect.* 25.

[a] Vide Dy. 186. pl. 2, 3. *That the Words* Wilful Murder, *in an Indictment on the Statute are ſufficiently purſued by laying the Murder done* ex malitia præcogitata.

Sect. 48. It is farther enacted by 3 & 4 *W.* & *M.* 9. Par. 3. *That if any Perſon or Perſons whatſoever be indicted of any Offence, for which by Vertue of any former Statute, he or they are excluded from having the Benefit of his or their Clergy, if he or they had been thereof convicted by Verdict or Confeſſion, if he or they ſtand Mute, or will not anſwer directly to the Felony, or ſhall challenge peremptorily above the Number of twenty Perſons returned to be on the Jury, or ſhall be outlawed thereupon, ſhall not be admitted to the Benefit of his or their Clergy.*

Sect. 49. But *Note*, That this Statute extends not to Appeals, nor to Offences made Felonies by ſubſequent Statutes.

And now I am in the ſecond Place more diſtinctly to conſider the ſeveral Statutes which take away the Benefit of the Clergy, ſo far as they particularly relate to the ſeveral Kinds of Crimes; for the better Illuſtration whereof having referred the Reader, as to the Felonies made ſuch by Statute, to the ſeveral Chapters in the firſt Book wherein ſuch Felonies are handled, I ſhall here conſider the Statutes which take away Clergy from Capital Offences at the Common Law, under the following Heads, as they relate,

1. To Petit Treaſon.
2. To Homicide.
3. To Larceny.
4. To Sacrilege.
5. To Robbery.
6. To Burglary.
7. To Arſon.

Sect. 50. And firſt as to Petit Treaſon: It is certain, that by force of 23 & 25 *H.* 8. revived [b] by 5 & 6 *E.* 6. the Principal not being a [c] Clerk in Holy Orders, is excluded from the Benefit of the Clergy, upon a [d] Conviction, [e] ſtanding Mute, or Challenge of more than twenty, upon an [f] Indictment.

[b] Vide ſupra, Sect. 43, 44.
[c] Vide ſupra, Sect. 13.
[d] Vide ſupra, Sect. 30, 31.
[e] Vide ſupra, 32, 33.
[f] Vide ſupra, Sect. 33.

Sect. 51. And Sir [g] *Matthew Hale* ſeems to be of Opinion, That the Principal is likewiſe ouſted of his Clergy, by 23 *H.* 8. in Appeal of Petit Treaſon, if he be convict by Verdict or Confeſſion, but not in other Caſes: But *Quære*, How this can be? For ſince ſo much [h] only of 23 *H.* 8. ſeems to be revived, as is affirmed and enforced by 25 *H.* 8. and that no way extends to Appeals but only to Indictments, it ſeems difficult to make out that any Part of 23 *H.* 8. ſo far as it relates to Appeals, is revived by 25 *H.* 8.

[g] H. P. C. 232.
[h] Vide ſupra, Sect. 43, 44.

Sect. 52. But I would rather incline to think that the Principal in an Appeal of Petit Treaſon may be excluded from his Clergy by 1 [i] *E.* 6. 12. in all Caſes except that of challenging above the Number of twenty, under the Words *Murder of Malice prepenſed* in that Statute; becauſe all Petit Treaſon, in the very Notion of it, neceſſarily [k] includes ſuch Murder and more.

[i] Vide ſupra, Sect. 34, 35.
[k] B. 1. ch. 2. Sect. 6.

Sect.

Sect. 53. However the Makers of 4 [a] *& 5 Ph. & M.* 4 ſeem plainly to have been of Opinion, That the Principals in Petit Treaſon are excluded from the Clergy in all Caſes as well upon an Appeal as Indictment; becauſe they have in all Caſes expreſsly excluded the Acceſſaries maliciouſly before, as well upon an Appeal as Indictment; and [b] it cannot be well imagined that they intended to make the Law more ſevere againſt them than againſt the Principals.

[a] Vide ſupra, Sect. 45.

[b] Vide 11 Co. 35. a. *And* ſupra Sect. 46.

Sect. 54. *Secondly*, As to Homicide: It is certain that willful Murder of Malice prepenſed is excluded from the Benefit of the Clergy upon Indictments in all Caſes by [c] 23 *&* [d] 25 *H.* 8. and by 1 [e] *E.* 6. 12.

[c] Vide ſupra, S. 25, 30, 31.
[d] Vide ſupra, Sect. 32, 33.
[e] Vide ſupra, Sect. 34, &c.

Sect. 55. Alſo it ſeems [f] to be the Opinion of Sir [g] *Matthew Hale*, That it likewiſe is excluded from the Clergy in all Caſes as well upon Appeals as Indictments, but this ſeems queſtionable; for Appeals are certainly not [h] within 25 *H.* 8. and [h] therefore ſince ſo much only of 23 *H.* 8. is revived by 5 *&* 5 *E.* 6. as is affirmed and enforced by 25 *H.* 8. I do not ſee how it can be revived as to any Appeal. From whence it ſeems to follow, That the only Statute which expreſsly excludes them is 1 *E.* 6. 12. which [i] omits the Caſe of challenging more than twenty. Neither is this Defect ſupplied by 3 *&* 4 *W. & M.* 9. for this extends * only to Indictments.

[f] H P.C. 232.
[h] Vide ſupr. Sect. 42, 43, 51.
[i] Vide ſupra, Sect. 34, 36.
* Supra Sect. 48, 49.

Sect. 56. But Acceſſaries maliciouſly before to ſuch Murder are expreſly excluded from the Clergy in all Caſes, as well upon Appeals as Indictments by 4 *&* 5 *P. & M.* 4 and how far the Principal may † hereby in like Manner be implicitly excluded alſo in all Caſes, I ſhall leave to be conſidered.

† Vide 11 Co. 35. a. and ſupra, Sect. 46, 53.

Sect. 57. By 1 *Jac.* 1. 8. He that ſhall be convicted by Verdict of twelve Men, or Confeſſion, or otherwiſe according to the Laws of this Realm, of Homicide, by Stabbing, (but not thoſe who abet them, *&c.* for which I ſhall refer to *Book* 1. *Chap.* 30. *Sect.* 4, 5, *&c.*) ſhall be excluded from the Benefit of his Clergy, *&c.*

Sect. 58. And this Statute ſeems plainly to extend as well to Appeals as Indictments, but not to the Caſe of ſtanding Mute, or challenging above twenty, *&c.* But thoſe who are indicted of ſuch Manſlaughter are excluded from the Clergy in all ſuch Caſes, as well as on a Conviction, by 3 *&* 4 *W & M.* 9.

Supra Sect. 48, 49.

Thirdly, Larceny is excluded from the Benefit of the Clergy in the following Caſes,

1. In that of a felonious ſecret Taking from the Perſon.
2. In that of Horſe-ſtealing.
3. In that of ſtealing from a Shop or Dwelling-Houſe, *&c.*
4. In that of ſtealing Woollen Manufactures from the Tenters.
5. In that of ſtealing the King's Naval Stores.

59. And firſt, As to a felonious ſecret Taking from the Perſon: It is enacted by 8 *Eliz.* 4. *That no Perſon who ſhall be indicted or appealed for felonious taking of any Money, Goods, or Chattles, from the Perſon of any other, privily without his Knowledge, in any Place whatſoever, and thereupon found guilty by Verdict of twelve Men, or ſhall confeſs the ſame upon his or their Arraignment, or will not anſwer directly to the ſame, according to the Laws of the Realm, or ſhall ſtand wilfully or of Malice, or obſtinately Mute, or challenge peremptorily above the Number of twenty, or ſhall be upon ſuch Indictment or Appeal outlawed, ſhall be admitted to his Clergy*, &c.

Vide Sect. 26, 45, 46.

Sect. 60. But *Note*, That this Statute extends not to any Acceſſaries before or after.

[a] Vide ſupra, Sect. 34, 39.

Sect. 61. *Secondly*, As to Horſe-ſtealers: It ſeems that they are [a] ouſted of their Clergy in all Caſes, as well upon Appeals as Indictments, by 1 *E.* 6. 12. and 2 *&* 3 *E.* 6. 33. by the latter of which Statutes it is enacted, *That all Perſons feloniouſly taking or ſtealing any Horſe, Gelding, or Mare, ſhall not be admitted to the Privilege of the Clergy, but ſhall be put from the ſame, in like Manner and Form as though they had been indicted or appealed for felonious ſtealing of two Horſes, two Geldings, or two Mares, of any other, and thereupon found guilty by Verdict of twelve Men, or confeſſed the ſame upon their Arraignment, or ſtand wilfully or of Malice Mute.*

[b] S. P. C. 125. Letters B. C. H. P. C. 238.

Sect. 62. It ſeems a reaſonable [b] Conſtruction of this Statute to extend it as well to thoſe who are outlawed, or challenge more than twenty, as to thoſe who are found guilty by Verdict, *&c.* becauſe it is general, That all ſuch Perſons *ſhall be put from their Clergy*, &c. *in ſuch Manner as if they had been found guilty*, &c. and if they had been found guilty, it is certain that they wou'd have been ouſted of their Clergy by the expreſs Words of 1 *E.* 6. 12. *Par.* 10.

Supra, 34, &c.

[c] H. P. C. 238.

Sect. 63. But I do not find that any [c] Statute excludes any Acceſſaries to this Offence from their Clergy.

Vide ſupra, Sect. 26, 45, 46.

Sect. 64. *Thirdly*, As to Larceny from a Dwelling-Houſe, Shop, *&c.* It is enacted by 10 *&* 11 *W.* 3. 23. *That all Perſons who by Night or Day, ſhall in any Shop, Ware-houſe, Coach-houſe or Stable, privately and feloniouſly ſteal any Goods, Wares, or Merchandizes, of the Value of* 5 s. *or more, though ſuch Shop*, &c. *be not broke open, and tho' the Owner, or any other Perſon be not in ſuch Shop*, &c. *or that ſhall aſſiſt, hire or command any Perſon to commit ſuch Offence, being thereof convict, or attainted by Verdict or Confeſſion, or being indicted thereof ſhall ſtand Mute, or challenge above twenty of the Jury, ſhall be excluded from the Benefit of the Clergy.*

[d] Vide Sect. 26. 27, 28. [e] Vide ſupra, Sect. 26, 45, 46. [f] Vide ſupra, Sect. 48, 49.

Sect. 65. But this Statute ſeems Defective in neither mentioning Perſons [d] outlawed, nor [e] Acceſſaries; neither is it help'd by 3 *&* 4 *W. & M.* 9. becauſe [f] it is ſubſequent to it.

Sect. 66. It is enacted by 12 *Annæ* 7. *That every Perſon who ſhall feloniouſly ſteal any Money, Goods, or Chattels, Wares, or Merchandiſes, of the Value of* 40 s. *or more, being in any Dwelling-houſe, or Out-houſe thereunto belonging, although ſuch Houſe or Out-houſe be not actually broken by ſuch Offender, and altho' the Owner of ſuch Goods, or any other Perſon or Perſons, be or be not in ſuch Houſe or Out-houſe, or ſhall aſſiſt, or aid any Perſon or Perſons, to commit any ſuch Offence, being thereof convicted or attainted by Verdict or Confeſſion, or being indicted thereof ſhall ſtand Mute, or will not directly anſwer to the Indictment, or ſhall peremptorily challenge above the Number of twenty returned to be of the Jury, ſhall be abſolutely debarred of and from the Benefit of Clergy*, &c.

Sect. 67. But it is provided, *That nothing in this Act ſhall extend to Apprentices under the Age of fifteen Years, who ſhall rob their Maſters as aforeſaid.*

Vide Sect. 26, 27, 28, 64, 65.

Sect. 68. This Statute ſeems alſo Defective like the former, as to Perſons outlawed, and Acceſſaries.

Sect. 69. *Fourthly*, As to thoſe who ſhall feloniouſly ſteal Woollen Manufactures from the Tenters: It is enacted by 22 *Car.* 2. 5. *That no Perſon who ſhall be indicted for feloniouſly cutting and taking, ſtealing or carrying away of any Cloth or Woollen Manufactures from the Rack or Tenter in the Night Time, and thereupon found guilty by Verdict of twelve Men, or ſhall confeſs the ſame on Arraignment, or will not anſwer directly to the ſame, according to the Laws of*

of the Realm, or shall stand wilfully or of Malice Mute, or challenge peremptorily above the Number of twenty, or shall be upon such Indictment outlawed, shall be admitted to the Benefit of the Clergy, &c.

Sect. 70. *Fifthly,* As to those who steal Naval Stores: It is observable, That those who *shall steal or imbezil any of his Majesty's Sail, Cordage, or any other his Majesty's Naval Stores,* are in the like Manner excluded from the Clergy by 22 *Car.* 2. 5. as those who steal Woolen Manufactures from the Tenters, *&c.* *See the precedent Section.*

Sect. 71. But *Note,* That this Statute extends neither to Appeals, nor to [a] Accessaries.

[a] Vide Sect. 26, & 45, 46.

Sect. 72. As to Sacrilege: It is observable, That all Persons not in Holy Orders, who shall be indicted, whether in the same County wherein the Fact was committed, or in a [b] different County, of *robbing any Church, Chapel, or other Holy Place,* are excluded from their Clergy by [c] 23 *H.* 8. 1. and 25 [d] *H.* 8. 3. revived [e] by 5 *&* 6 *E.* 6. 10. upon a Conviction, standing Mute, or peremptory Challenge of more than twenty; and by 3 *&* [f] 4 *W. & M.* 9. upon an Outlawry.

[b] Infra, 80, 81, 82.
[c] Vide supra, Sect. 30, 31.
[d] Vide supra, Sect. 34, 33.
[e] Vide supra, Sect. 42, 43, 44.
[f] Vide supra, Sect. 48, 49.

Sect. 73. But the Word *Robbing* [g] being always taken to carry with it some Force, as shall be more fully shewn *Sections* 88, 92, 96. It seems that no Sacrilege is within any of these Statutes, which is not accompany'd with the actual breaking of a Church, *&c.*

[g] Kely. 58, 69, 70. Dyer 224, pl. 30.

Sect. 74. But by 1 *E.* 6. 12. [h] *Par.* 10. all Persons in general are ousted of their Clergy for the *felonious taking of any Goods out of any Parish Church, or other Church or Chapel,* in all Cases, except that of challenging more than twenty; and by 3 *&* [i] 4 *W. & M.* 9. upon such a Challenge, as well as upon a Conviction, *&c.* upon an Indictment, [k] whether in the same County wherein the Sacrilege was committed, or in a different one.

[h] Vide supra, Sect. 34, 35, 36, 37.
[i] Vide supra, Sect. 48, 49.
[k] Infra, 80, 81, 82.

Sect. 75. But it seems, That Accessaries to such a Robbery, or felonious taking are excluded from their Clergy by no Statute; for tho' they are expressly mentioned by 23 *H.* 8. 1. yet since they are omitted by 25 *H.* 8. 3. and so much only [l] of 23 *H.* 8. 1. is revived as is affirmed and enforced by 25 *H.* 8. 3. they seem to remain in the same Case as if they had been wholly omitted by 23 *H.* 8. 1. which is the only Statute I know of which extends to them, except the Offence amount to Burglary, in which Case Accessaries before are ousted of their Clergy by 3 *&* 4 *W. & M.* 9.

[l] Vide supra, Sect. 43, 44, 52, 55.

Sect. 76. But *Quære* if there be need of any Statute to exclude them, since the Common Law seems to have given no Person whatsoever, any Right to Demand the Privilege of the Clergy for Sacrilege, but only at the Discretion of the Ordinary, as hath been more fully shewn *Section* the ninth.

Fifthly, As to Robbery, I shall particularly consider the Statutes excluding it from the Clergy, as they relate,

1. To Robbery in or near the Highway.
2. To Robbery in a Dwelling-House, Booth or Tent.
3. To Robbery in general.

Sect. 77. And first, as to Robbery in or near the Highway: It is observable, That all Persons, not in Holy Orders, who shall be indicted [m] of *Robbing any Person or Persons in or about the Highways,* are ex-

[m] Vide supra, Sect. 33.

excluded from the Clergy by 23 * *H.* 8. 1. and 25 [b] *H.* 8. 3. revived [c] by 5 & 6 *E.* 6. 10 upon a Conviction, ſtanding Mute, or peremptory Challenge of more than twenty; and by 3 & 4 [d] *W.* & *M.* 9. upon an Outlawry.

* Vide ſupra, Sect. 30, 31
[b] Vide ſupra, Sect. 32, 33.
[c] Vide ſupra, S. 42, 43, 44.
[d] Vide ſupra, Sect. 48, 49.
† Vide ſupra. Sect. 34, 35, 36, 37.

Sect. 78. And *Note*, That all Perſons in general, *who ſhall be guilty of robbing any Perſon or Perſons in the Highway, or near to the Highway*, are excluded from the Clergy both upon an Appeal and Indictment by † 1 *E.* 6. 12. *Par.* 10. in all Caſes except that of challenging more than twenty; and by 3 & 4 *W.* & *M.* 9. upon ſuch a Challenge upon an Indictment.

Sect. 79. *Note*, That no Robbery is within theſe Statutes, but ſuch as is laid in the Indictment to have been committed in or near the [e] High way, [f] and to have [g] put the Perſon robbed in Fear.

[e] Vide ſupra, Sect. 25
[f] Supra Sect. 73. *And* Dy. 224. pl. 30. *And* B. 1. Ch. 35. Sect. 13.
[g] Vide ſupra Sect. 43, 44

Sect. 80. It is recited by 25 *H.* 8. 3. revived [g] by 5 & 6 E. 6. 10. *That divers Felons and Robbers that had committed many heinous Robberies and Burglaries in one Shire, and conveyed the Spoil and Robbery into another Shire, and had been there* [h] *taken, indicted and arraigned upon Felony, and feloniouſly taking of the ſame Goods, and not upon the ſame Robbery nor Burglary; for that it was not committed nor done in the ſame Shire where they had been ſo indicted and arraigned, and by Reaſon thereof the ſame Felons, Robbers, and Burglars had enjoyed the Privilege of their Clergy.* And thereupon it is enacted, *That if any Perſon or Perſons be indicted of Felony for ſtealing of any Goods or Chattels, in any County within this Realm of* England, *and thereupon arraigned and be found guilty, or ſtand Mute of Malice, or challenge peremptorily above the Number of twenty Perſons, or will not directly anſwer to the Law, ſhall loſe and be put from the Benefit of the Clergy, in like Maaner and Form as they ſhould have been if they had been indicted and arraigned, and found guilty in the ſame County where the ſame Robbery or Burglary was done or committed; if it ſhall appear to the Juſtices before whom any ſuch Felons or Robbers be arraigned, by Evidence given before them, or by Examination, that the ſame Felonies, whereupon they were ſo arraigned, had been ſuch Robberies or Burglaries, in the ſame Shire wherein ſuch Robberies or Burglaries were commiteed or done, by Reaſon whereof they ſhould have loſt the Benefit of their Clergy by Force of* 23 H. 8. *in Caſe they had been found guilty thereof in the ſame Shire where ſuch Robberies or Burglaries were ſo committed and done.*

[g] Vide ſupra, Sect. 43, 44
[h] Vide B. 1. Ch. 33. S. 9.

Sect. 81. But *Note*, That this Statnte extends [i] not to thoſe who are outlawed; nor to thoſe who are indicted out of the Realm of *England*; nor to thoſe who are indicted of ſuch ſtealing as is excluded from the Clergy by ſubſequent Statutes; nor to Appellees; but the three firſt of theſe Defects are ſupplied by 3 & 4 *W.* & *M.* 9. by which it is enacted, *That if any Perſon or Perſons be indicted of Felony for ſtealing of any Goods or Chattels in any County within this Realm of* England, *Dominion of* Wales, *or Town of* Berwick *upon* Tweed, *and thereof be convicted or attainted, or upon his or their Arraignment ſhall ſtand Mute, or will not directly anſwer to the Indictment, or ſhall challenge peremptorily above the Number of twenty Perſons returned to be of the Jury, he or they ſhall be totally excluded from having the Benefit of his or their Clergy, if it appear upon Evidence or Examination before the Juſtices, that the ſaid Goods or Chattels were taken by Robbery or Burglary, or in any other Manner, in any other County, whereof if ſuch Perſon or Perſons had been convicted by a Jury of the ſaid other County, he or they are excluded by Vertue of this or any other Act from having the Benefit of his or their Clergy.*

[i] 11 Co. 31. a.

Sect.

Sect. 82. *Note*, That [a] the Words *If it ſhall appear upon Evidence before the Juſtices*, &c. are to be intended where the Party pleads Not guilty, and is found guilty by the Jury, and the Words *If it ſhall appear upon Examination*, &c. are to be intended where he ſtands Mute, or challenges peremptorily above the Number of twenty, or is outlawed, or confeſſes [b], *&c.* And it hath been [c] adjudged, That there is no need to make any Entry on the Record, that it appears by ſuch Evidence, or Examination, that the Felony was originally commenced in a different County, and was of ſuch a Nature that the Offender cou'd not have his Clergy. But it is ſaid, [d] That it is uſual to write in the Margent of the Indictment, that it is for Robbery, *&c.* in another County.

[a] 11 Co. 31.

[b] Vide ſupra, Sect. 28, 31. 11 Co. 31. Cont. 1 And. 114.

[c] 1 And. 114.

[d] H. P. C. *in the old Edition printed in the Year*, 1678.

Sect. 83. It is ſaid to [e] have been holden by all the Juſtices, That if the Felony whereof a Man is found guilty in the County wherein he is indicted, be ſuch as doth not need the Benefit of the Clergy, as amounting only to Petit Larceny, *&c.* the Offender ſhall have only the proper Judgment for ſuch Offence, and no other, in Reſpect of the Robbery, *&c.* proved upon the Evidence, *&c.* in the firſt County, for being convicted of no Offence which will warrant a Judgment of Death, and conſequently having no need to demand his Clergy, he cannot be hurt by being excluded from it.

[e] Moo. 550. pl. 739. H. P. C. 241.

Sect. 84. It is enacted by 3 *&* 4 [f] *Ph. & M.* 4. *That thoſe who ſhall maliciouſly command, hire or counſel any Perſon or Perſons to commit or do any Robbery in or near any Highway in this Realm of* England, *or in any other the Queen's Dominion, ſhall be cuſted of their Clergy, on a Conviction, ſtanding Mute, peremptory Challenge of more than twenty, or Outlawry.*

[f] Vide ſupra, Sect. 45, 46. *How ſuch Offence muſt be laid in the Indictment.*

Secondly, As to Robbery in a Dwelling-houſe, Booth or Tent, I ſhall conſider the Statutes concerning it as they relate,

Vide ſupra, Sect. 25.

1. To ſuch Robbery putting ſome Perſon in Fear.
2. To ſuch Robbery putting no Perſon in Fear.

Sect. 85. *Firſt*, As to ſuch Robbery putting ſome Perſon in Fear: It is obſervable, That all Perſons not in Holy Orders, *who ſhall rob any Perſon or Perſons in their Dwelling-houſes, or Dwelling-place, the Owner or Dweller in the ſame Houſe, his Wife, his Children or Servants then being within, and put in fear and dread by the ſame*, and indicted, [g] are excluded from their Clergy by 23 *H.* 8. 1. and 25. *H.* 8. 3. revived by 5 *&* 6. *E.* 6. 10. upon a Conviction, ſtanding Mute, or peremptory Challenge of more than twenty, and by 3 *&* 4. *W. & M.* 9. upon an Outlawry.

[g] Vide ſupra, Sect. 30, 31, 32, 33, 42, 43, 44, 48, 49, 72, 77.

Sect. 86. And *note*, [*] That by 25 *H.* 8. 3. and 3 *&* 4 *W. & M.* 9. they are excluded from their Clergy on an Indictment in a Foreign County. And their Acceſſaries before are excluded in all Caſes by 3 *&* 4 [||] *Ph. & Ma.* 4.

[*] Vide ſupra, Sect. 80, 81, 82, 83.

[||] Vide ſupra, Sect. 45. 46.

Sect. 87. And by 1 [†] *Ed.* 6. 12. *Par.* 10. all Perſons in general who ſhall *break any Houſe by Day or by Night*, (*viz.* [h] who ſhall break a Houſe burglarily, if in the Night, or ſhall break a Houſe and commit a Felony therein, if in the Day) [i] *any Perſon being then in the ſame Houſe where the ſame breaking ſhall be, and thereby put in Fear or Dread*, are excluded from their Clergy, as well upon an Appeal as an Indictment, in all Caſes, [k] except that of challenging more than twenty; and by 3 [l] *&* 4 *W. & M.* 9. upon ſuch a Challenge, as well as upon a Conviction, *&c.* upon an Indictment, whether in the ſame County wherein the breaking and Felony

[†] Vide ſupra, Sect. 34, &c.

[h] Vide ſupra, Sect. 40. 11 Co. 36. b.

[i] Vide infra, Sect. 93.

[k] Vide ſupra, Sect. 36.

[l] Vide ſupra, Sect 48, 49.

was committed, or in a [a] different County; and the Acceſſaries before to ſuch a breaking if accompanied with ſtealing in a Dwelling-houſe, are ouſted of their Clergy in all * Caſes by 4 & 5 *Ph. & M.* 4. becauſe the felonious taking being accompanied with a Breaking, ſeems properly [b] enough to come under the Notion of Robbery in a Dwelling-houſe, all Acceſſaries to which before the Fact are expreſsly excluded from their Clergy by that Statute, as Acceſſaries before to Robbery in general are by 3 & †4 *W. & M.* 9.

[a] Vide ſupra, Sect. 80, 81, 82. 83

* H. P. C. 236.

Supra Sect. 45. 46.

[b] Vide ſupra, Sect. 73. And infra, Sect. 88, 92, 96.

† Supra Sect. 48, 49.

Sect. 88. But [c] no Breaking is within the Statute of 1 *E.* 6. which doth not amount to an actual breaking of an Houſe, or of ſome Part of it; as of a Cupboard or Door, *&c.* fixed to the Freehold; and therefore the breaking of a Trunk or Box, *&c.* ſeem plainly not be within the Statute. But by 3 & 4 *W. & M.* 9. *Every Perſon or Perſons that ſhall feloniouſly take away any Goods or Chattel, being in any Dwelling houſe, the Owner, or any other Perſon being therein, and put in Fear, or ſhall comfort, aid, abet, aſſiſt, counſel, hire, or command any Perſon to commit ſuch Offence, being thereof convicted or attainted, or indicted, and ſtanding Mute, or peremptorily challenging above twenty, ſhall be ouſted of the Benefit of their Clergy.*

[c] Kely. 58, 59, 70.

Supra, Sect. 73, 87 infra, S. 92, 96.

H. P. C. 237, 238.

Secondly, As to ſuch Robbery, putting no Perſon in Fear: I ſhall conſider the Statutes concerning it as they relate,

1. To ſuch Robbery in a Houſe, which ſome Perſon is in at the Time.

2. To ſuch Robbery in a Houſe, which no Perſon is in at the Time.

Sect. 89. As to the firſt of theſe, it is enacted by 5 & 6 *E.* 6. 9. *That if it happen any Perſon or Perſons to be found guilty according to the Laws of this Realm, for robbing of any Perſon or Perſons in any Part or Parcel of their Dwelling-houſes, or Dwelling-places, the Owner or Dweller in the ſame Houſe, or his Wife, his Children or Servants being then within the ſame Houſe or Place where it ſhall happen the ſame Robbery and Felony to be committed and done, or in any other Place within the Precinct of the ſame Houſe or Dwelling-place, that ſuch Offenders ſhall in no wiſe be admitted to their Clergy, whether the Owner or Dweller in the ſame Houſe, his Wife or Children then and there being, ſhall be waking or ſleeping.*

Sect. 90. *And that no Perſon or Perſons which ſhall happen to be found guilty after the Laws of this Realm, of and for robbing any Perſon or Perſons, in any Booth or Tent, in any Fair or Market, the Owner, his Wife, his Children, or Servants or Servant then being within the Booth or Tent, ſhall not be admitted to the Benefit of his or their Clergy, but utterly be excluded thereof,* &c. *without having any Reſpect or Conſideration whether the Owner or Dweller in ſuch Booths and Tents, his Wife, Children or Servants being in the ſame Booths or Tents at the Time of ſuch Robberies and Felonies committed, ſhall be ſleeping or waking.*

Sect. 91. This Statute [d] ſeems plainly to extend to all who ſhall be convicted by Verdict or Confeſſion, whether upon an Appeal or Indictment; but not to thoſe who ſhall be outlawed, or ſtand Mute, or challenge peremptorily above twenty Jurors; but theſe Defects are ſupplied as to Indictments by 3 [e] & 4 *W. & M.* 9.

[d] H. P. C. 236, 237.

[e] Vide ſupr. Sect. 48, 49.

Sect.

Sect. 92. It seems to be generally agreed, That no Robbery is within this Statute which is not accompanied with an actual [a] breaking of an House, or of some Part of it.

Sect. 93. Also it seems to be agreed, [b] That a Sojourner's being in a House at the Time of the Robbery doth not bring it within this Statute; for the Words are *The Owner or Dweller in the same House, or his Wife, his Children, or Servants, being then within the same House*, &c. Yet it is said in [c] *Hale's Pleas of the Crown* to have been ruled by Advice of the Justices, That where one entered into the Lodging of Sir *H. Hungate*, being Parcel of *Whitehall*, and broke open a Chamber and took away his Goods, his Case was within this Statute, and that the Indictment ought to be for breaking the King's House, called *Whitehall*, and for stealing the Goods of Sir *H. H.* divers Persons being in the House: But *Note*, That this Case is wholly omitted in the first Edition of *Hale's Pleas of the Crown*, and I cannot but think that it is misprinted in the Second; because such a Robbery seems by no Means within the Purview of this Statute, which extends only to such Robberies as are done to a Man in such a Place as may be called *his Dwelling-house or Dwelling place, his Wife, Children, or Servants being at the same Time within the same.* But in the State of this Case it seems to be admitted, That *Whitehall*, wherein the Felony was committed, could not properly be called, nor ought to be laid in the Indictment as the Dwelling-house or Dwelling place of the said Sir *H. H.* who was the Person robbed, but of the King: Also it seems to be admitted, That it is sufficient to set forth generally in the Indictment that divers Persons were in the House, without shewing that they were under any Relation to the Person robbed, as his Children or Servants, *&c.* which [d] seems to be necessarily required by 5 *&* 6 *E.* 6. 9. And therefore I take it, that the Statute here intended is not 5 *&* 6 *E.* 6. 9. but rather 1 *E.* 6. [e] 12. *Par.* 10. or 39 [f] *El.* 15. Yet *Quære*; for neither of these Statutes seem to extend to this Case as it is here put. However 3 *&* 4 *W. & M.* 9. seems fully to extend to it. By which it is enacted, *That all those who shall rob any Dwelling-house in the Day-Time, any Person being therein, or shall comfort, aid, abet, assist, counsel, hire, or command any Person to commit such Offence, being thereof convicted or attainted, or indicted, and standing Mute, or challenging peremptorily above twenty, shall be ousted of their Clergy.* But I do not [g] find that any Statute excludes those from their Clergy who are Accessaries to a Robbery in a Booth or Tent, except it be from the Person of a Man, in which Case the Accessaries before the Fact seem to be excluded from their Clergy by 3 *&* 4 *W. & M.* 9. as shall be more fully shewn hereafter.

Sect. 94. It seems plain, That those who are guilty of a Felony within these Statutes, are excluded from their Clergy by 3 *&* 4 *W. & M.* 9. on an Indictment in a Foreign County, in the same Manner as if they had been convicted in the first County, as hath been more fully shewn, *Sect.* 80, 81, 82, 83.

Sect. 95. *Secondly*, As to such Robbery in a House which no Person is in at the Time: It is recited by 39 *El.* 15. *That then of late divers lewd and felonious Persons, understanding that the robbing of Houses in the Day-time, no Person being therein at the Time, is not so penal as where some Person is therein, had been emboldened to take their Opportunity to commit many heinous Robberies, in breaking and entring divers Houses*, &c. and thereupon it is enacted, *That if any Person shall be found guilty, and convicted by Verdict, Confession, or otherwise, according to the Laws of this Realm, for the felonious taking away*

[a] *For this* vide supra, Sect. 73, 87, 88, 95. H. P. C. 237, 238. *Yet in* Pop 84. *there is a Case seemingly contrary.*

[b] Hetley 64. S. P. C. 129. H. P. C. 236, 237. 11 Co. 36. b.

[c] Folio 237, 238.

[d] Vide Hetl. 64. H. P. C. 235, 236. 11 Co. 36. b. S. P. C. 129. b. Popham 84.

[e] Vide supra, Sect. 87.

[f] Vide infra, S. 95, 96, 97.

[g] *See the Statute of* 3 *&* 4 Ph. & M. supra, Sect. 45. 46.

away in the Day-time, of any Money, Goods or Chattel, being of the Value of 5 s. or upwards, in any Dwelling-house or Houses, or any Part thereof, or any Out-house or Out-houses, belonging and used to and with any Dwelling-house or Houses, altho' no Person shall be in the said House or Out-houses at the Time of such Felony committed, then such Person shall not be admitted to the Benefit of his Clergy.

Sect. 96. Notwithstanding the Words of the Purview of this Statute seem plainly to include all felonious Takings to the Value of 5 *s.* out of a House, *&c.* whether with or without Force; yet since the Mischief complained of in the Preamble, and intended to be redressed is the frequent committing of many *heinous Robberies in breaking and entring*, &c. and since all other [a] Statutes excluding the Benefit of the Clergy from Robberies in Houses, have been construed to extend to such Larcenies only as are accompanied with a breaking of a House, or of some Part of it; it seems agreed, [b] That this Statute also shall extend only to such a felonious taking as is accompanied with the like breaking.

[a] Supra Sect. 73, 87, 88, 92, 96.

[b] Kely. 30, 58, 69, 70. H. P. C. 237, 238.

Sect. 97. It seems agreed, [c] That a Chamber in one of the Inns of Court, wherein a Person usually lodges, is properly a Dwelling-house within this Statute, and may be so called in an Indictment, because every Owner of such a Chamber hath a separate Interest in it. But that a Lodging in *Whitehall* or *Somerset-house* is not [d] a Dwelling-house within this Statute; from whence it seems to follow, That a Robbery in such a Lodging is not excluded from the Clergy by this Statute, if any Person were at the Time in any other Part of the Palace, because the whole is but one Dwelling-house.

11 Co. 36. b. Cro. Ca. 473, 474.

[c] Cro. Ca. 473, 474. 1 Jon. 394. H P. C. 83, 237. Kely. 27, 52. *See* B. 1. ch. 38. Sect. 13.

[d] Kely. 27, 52. Vide supra, Sect. 93.

Sect. 98. It seems agreed, [e] That no Accessary is ousted of his Clergy by this Statute. Also it hath been adjudged, [f] That he who stands by and abets another while he breaks and enters the House, and afterwards divides the Money with him, but doth not actually enter the House himself, is not within the Statute, the Reason whereof seems to be this, That the Words, *If any Person shall be convicted*, &c. *of a felonious taking*, &c. *in a Dwelling-house*, &c. shall in so penal a Law be intended only of an actual taking, and not of a constructive one. But this seems an extremely nice Case, and if it were a new Point, and not confirmed by Experience, the Authority of it might perhaps be justly questioned; for if the Person who only stood by and entred not the House, had actually entred it, and the other only had taken the Money, and had not given him any Part of it till both had gone out of the House; in this Case, as well as in the other, it might be said, That he who actually received not any Part of the Money till he was gone out of the House, was guilty only of a constructive taking in the House, and consequently not within this Statute. But I cannot easily perswade my self but that in such a Case both must be adjudged equally within the Statute; and why not as well in the other, it seeming an uncontroverted * Rule, That where divers are present and abet one another in committing any Felony, the Act of one shall be looked on as the Act of all. And upon this Ground, as I take it, it hath been always agreed, That those who are present, and abetting, when a Murder is committed, are all of them equally excluded from their Clergy, whether they actually gave the stroke or took the Money or not; and yet the Statutes to this Purpose mention only those who shall be found guilty of Murder or Robbing, *&c.* Nor do I find any Resolution to the contrary on any other Statute concerning Clergy, except only the [g] Statute of *Stabbing*, whereon it hath been adjudged, [h] That the Person only who gives the Stab is within the

[e] H. P. C. 237. Supra Sect. 45, 46.

[f] Cro. Ca. 473, 474. *Note, that the same Case is in* 1 Jon. 394. *but this Point is not taken Notice of.*

* Vide supra, Ch. 29. Sect. 7, 8, 13.

[g] 1 Jac. 1. 8.

[h] Aleyn 44. H P. C. 58. B 1. ch. 30. Sect 71.

the Purview of it: But this ſeems plainly to depend on the particular Circumſtances of this Offence, which is excluded from the Clergy in Reſpect of the Cruelty and Bloody Mind of him who gives the Stab, which certainly is peculiar to himſelf.

Sect. 99. However it is certain at this Day, *That whoever ſhall comfort, aid, abet, aſſiſt, counſel, hire or command any Perſon or Perſons to break any Dwelling-houſe, Shop, or Ware-houſe thereunto belonging, or therewith uſed, in the Day-time, and feloniouſly take away any Money, Goods, or Chattel of the Value of 5 s. or upwards therein being, altho' no Perſon ſhall be within ſuch Dwelling-houſe, Shop or Ware-houſe, being convicted or attainted, or being indicted and ſtanding Mute, or challenging peremptorily above twenty, ſhall be excluded from their Clergy, by the expreſs Words of* 3 & 4 W. & M. 9.

Sect. 100. But *Note*, That this Clauſe mentioning only a felonious taking in a Dwelling-houſe, Shop, or Ware-houſe thereunto belonging, and not mentioning Out-houſes in general, as 39 *El.* doth, ſeems to have done it with a View to leave Out-houſes to the ſame Conſtruction which prevailed before; and therefore I take it that an Aſſiſtant to ſuch a Felony in an Out-houſe, not being ſuch a Shop or Ware-houſe, without entring into it, is clearly intitled to the Benefit of his Clergy ſince this Statute, however it might be diſputed before. Vide ſupra, Sect. 98.

Sect. 101. *Note* alſo, That the Acceſſaries before to ſuch a Felony in any Out-houſe, not being ſuch a Shop or Warehouſe, are ſtill intitled to the Benefit of their Clergy, becauſe the only [a] Law which excludes them is the [b] above-cited Clauſe of 3 & 4 *W. & M.* 9. which extends only to ſuch Felonies in a Dwelling-houſe, Shop or Ware-houſe thereunto belonging.

[a] H. P. C. 227.
[b] Supra Sect. 99.

Sect. 102. But all Principals in any Felony within the ſaid Statute of 39 *El.* are excluded from their Clergy by the ſame Statute upon any Conviction, whether upon an Indictment or Appeal; and by the ſaid Statute of 3 * & 4 *W. & M.* upon an Outlawry, ſtanding Mute, or peremptory Challenge of more than twenty, upon an Indictment, whether in the ſame County in which the Felony was firſt committed, or in a different [c] County.

* Supra Sect. 48, 49.
[c] Supra Sect. 81, 82, 83.

Sect. 103. *Thirdly*, As to Robbery in general, it is enacted by 3 & 4 *W. & M.* 9. *That all and every Perſon or Perſons that ſhall rob any other Perſon, or ſhall comfort, aid, abet, aſſiſt, counſel, hire or command any Perſon or Perſons to commit ſuch Offence, being thereof convicted or attainted, or being indicted and ſtanding Mute, or challenging peremptorily above twenty, ſhall not have the Benefit of his Clergy.*

Sect. 104. *Sixthly*, As to Burglary: [d] If any Perſon be in the Houſe at the Time of the breaking, and thereby put in fear, the Principal is excluded from his Clergy by 1 *E.* 6. 12, *Par.* 10. in all Caſes, except that of challenging more than twenty, and by 25 *H.* 8. revived [e] by 5 & 6. *E.* 6. or at leaſt by 3 & 4 *W. & M.* 9. upon ſuch a Challenge, upon an Indictment.

[d] Vide 11 Co. 35. b. 36. Supra Sect. 34, 36, 40.
[e] Vide ſupra, Sect. 42, 43, 44.

Sect. 105. Alſo the Principal in every Burglary, whether [f] any Perſon were in the Houſe at the Time or not, is excluded from his Clergy by 18 *El.* 7. upon a [g] Conviction by Verdict, Outlawry, or Confeſſion; and by 3 & 4 *W. & M.* upon ſtanding Mute, or challenging peremptorily more than twenty upon an Indictment.

[f] Poph. 42, 52. 1 And. 302. Moor 660. 4 Co. 40. a. B. 1. ch. 38. Sect. 11.
[g] 11 Co. 35. b. H. P. C. 233.

[a] Vide 11 Co. 36. a. H. P. C. 233, 234.

Sect. 106. Alſo by [a] the ſame Statute of 3 & 4 *W. & M.* 9 *Every Perſon who ſhall counſel, hire or command any Perſon to commit any Burglary, being thereof convicted, or attainted, or being indicted, and ſtanding Mute, or challenging peremptorily above twenty, ſhall not have his Clergy.*

[b] H. P. C. 233. 11 Co. 29, &c. [c] Vide ſupra, Sect. 10, 11, 12, 13, 30, 32. [d] Vide ſupra, Sect. 43. 44. [*] Supra Sect. 25, 45. [e] S. P. C. 130.

Sect. 107. *Seventhly*, As to Arſon: It hath been clearly [b] ſettled, ſince *Poulter's* Caſe, that the Principal [c] not being in Holy Orders, is excluded from the Clergy upon an Indictment in all Caſes, except Outlawry, by 23 *H.* 8. and 25 *H.* 8. as [d] revived by 5 & 6 *E.* 6. 10. And it is certain that he is excluded upon an Outlawry on an Indictment by 3 & 4 *W. & M.* 9.

Sect. 108. Alſo Acceſſaries to the Fact before, maliciouſly, are excluded in all Caſes by 3 [*] & 4 *Ph. & M.* 4.

Sect. 109. *Note*, That by 1 *E.* 6. 12. *Par.* 14. [e] Every Lord of Parliament is allowed his Clergy in all Caſes, wherein others are excluded by that Act, except wilful Murder, and conſequently cannot be denied his Clergy for any other Felony wherein it was grantable at Common Law, unleſs it be ouſted by ſome Statute made ſince the firſt Year of *Edward* 6. or † revived by 5 & 6 *E.* 6. 10.

† Supra Sect. 42, 43, 44. [f] *See the Statute of* Marl. Ch. 28. Weſtm. 1. Ch. 2. Articuli Cler. Ch. 15. 2 Inſt. 150, 163, 164, 633. S. P. C. 123. Lett. C. 130. b. 131. a. 185. Bract. lib. 3. Ch. 9. Supra, Ch. 15. Sect. 83. Hob. 288, 289. *Yet in* Kely. 100. *the contrary ſeems to be holden.* [g] Vide Bract. lib. 3. Cap 9. Articuli Cleri ch. 15. S. P. C. 138. Lett. E. 139 Lett. A. 140 Supra Sect. 1, 2. Fitz. Coro. 128. [h] S. P. C. 131, 185. 2 Inſt. 164, 633, 634. H. P. C. 239. Finch of Law 463. Fitz. Coro. 376, 232, 382, 386 417. Com 262. b. *That the Goods* 5 Co 109. [m] H. P. C. 239. [n] Fitz Coro *clearly holden* 3 H. 7. 12 pl. 10. *Abridged* Fitz. Coro. 72.

Sect. 110. As to the third general Point of this Chapter, *viz.* At what Time the Benefit of the Clergy is demandable: It ſeems, [f] That it might be demanded by the ancient Common Law as ſoon as the Priſoner was brought to the Bar, before any Indictment or other Proceeding againſt him; for it is plain, That anciently the Clergy claimed, and were in a great meaſure indulged a Privilege of being wholly [g] free from ſecular Juriſdiction for Crimes puniſhable with loſs of Life or Member. But after the Stat. of *Weſtm.* 1. *Ch.* 2. which ſtrictly enjoined the Ordinaries not to ſuffer Clerks who have been indicted by ſolemn Inqueſts to be delivered without due Purgation, the Judges ſoon made a ſettled Rule [h] not to deliver any Clerk to the Ordinary, before he had been firſt indicted and arraigned, and his Offence had been inquired of and found by an Inqueſt of Office, which was done both to the end that if the Priſoner were found guilty, he [i] might abſolutely forfeit his Goods, (which anciently were ſaved by a Purgation) and alſo that the Court might be appriſed, whether it were proper from the Circumſtances of the Caſe, diſcloſed upon ſuch an Inquiry, to deliver the Clerk to the Ordinary generally, in which Caſe he was allowed to make his Purgation [k], or ſpecially, [l] *abſque purgatione facienda.* But this Practice being found inconvenient to Priſoners, becauſe they loſt their Goods if found guilty by ſuch Inquiry, and yet could take no Challenge to any of the Jury, it being but an Inqueſt of Office, it hath been the general Practice [m] ever ſince the Reign of *H.* 6. to oblige thoſe who demand the Beneſit of the Clergy to plead and put themſelves upon their Trial, under [n] Pain of being dealt with as thoſe that ſtand Mute, whereby they forfeit their Goods [o] without any Inquiry concerning their Crime; but yet [p] cannot be denied their Clergy, where they ſhould be intitled to it in caſe they were convicted, unleſs they be ſpecially excluded by ſome Statute. But after a Clerk hath put himſelf upon his Trial, and the Inqueſt are charged with him, it is ſaid that he [q] may, if he deſire it, be admitted to his Clergy, before the Jury come back; but ſhall not forfeit his Goods unleſs they find him guilty.

But this ſeems to be doubtful Fitz. Coro. 233. [i] S. P. C. 131, 185. 5 Co. 110. Regiſt. 68. Pl. Cont. 40 Aſſ. 42. pl. 23. *Abridged* Fitz. Coro. 91. Bro. Forfeiture 5. Hob. 289. *as holden, are not forfeit without a Conviction.* [k] H. P. C 240. Hob. 288, 289 S. P. C. 139. Lett. D. [l] Vide Fitz. Coro. 109, 417. H. P. C. 240. Raſt. Ent. 121. pl. 1. Hob. 288, 289 Kely. 100. 2 Inſt 164. Fitz. Coro. 53, 58. S. P. C. 131. Salk. 61. Finch of Law. 463 Hob. 288. 58. *ſo ſaid in a Note of a Caſe in* 3 H. 7. 1. *but I do not find it made out by the Books at large.* [o] 8 H. 4. 3. pl. 5. *Abridged* Fitz. Coro. 53. [p] Supra Ch. 30. Sect. 19. [q] S. P. C. 131. a. b. Finch of Law. 463.

Sect.

Sect. 111. Alſo I take it to be generally agreed in the latter [a] Books, That a Perſon may demand his Clergy after a *Non legit* recorded; and alſo after Judgment given againſt him, whether of [b] Death, or of [c] *pain fort & dure*, or of [d] Outlawry, *&c.* as well as before Judgment, and even [e] under the Gallows, if there be a Judge there who has Power to allow it; as a Juſtice of the King's Bench, if the Party were condemned there; or a Juſtice of Gaol-Delivery if he were condemned before him, and the Commiſſion of Gaol-Delivery be not [f] yet adjourned, and according to ſome [g] Opinions, even tho the Commiſſion were adjourned.

Sect. 112. As to the fourth general Point of this Chapter, *viz.* Whether the Benefit of the Clergy ſhall be allowed where it is not demanded: I take it to be generally agreed, That notwithſtanding it was anciently the [h] uſual Method for the Ordinary to demand the Criminal as his Clerk, before the Court allowed him the Benefit of his Clergy; Yet there was no [i] Neceſſity that any ſuch Demand ſhould be made by the Ordinary; But the Court might without it admit a Perſon to the Benefit of his Clergy, upon ſufficient Evidence of his being a Clerk, as upon his producing Letters of Orders, or reading as a Clerk, *&c.* except he appears to have been guilty of Sacrilege, or of breaking the Priſon of the Ordinary, in which Caſes it is ſaid to have been in a great Meaſure left to the [k] Diſcretion of the Ordinary, whether he ſhould have his Clergy or not. And as there is no neceſſity that the Ordinary ſhould demand the Benefit of the Clergy for a Clerk; ſo [l] neither doth there ſeem to be any that the Priſoner himſelf ſhould demand it, where it ſufficiently appeared to the Court that he has a Right to it in Reſpect of his being in Orders, *&c.* in which Caſe, if the Priſoner does not demand it, it ſeems to be left to the Diſcretion of the Judge, whether he will allow it him or not.

Sect. 113. As to the fifth general Point of this Chapter, *viz.* Who is to judge whether a Perſon who demands the Benefit of the Clergy, have a Right to it or not: I take it, That in all Caſes the temporal Judge is to determine both, whether the Crime be within the Benefit of the Clergy, and alſo whether the Perſon who demands it be qualified to demand it or not; for notwithſtanding it had its [m] original Commencement from the Canon Law, yet it being no [n] otherwiſe to be allowed here than as it hath been received by, and is agreeable to the Common or Statute Law, whereof the temporal Courts are the Judges, it ſeems very reaſonable that all Queſtions [o] of this kind be determined by thoſe Courts. And therefore even in thoſe Caſes, wherein by the old Books the Ordinary ſeems to have been allowed a diſcretionary Power of demanding or refuſing a Clerk, as where he hath been guilty of [p] Sacrilege, and alſo in Caſes wherein it is ſaid generally, That a Priſoner hath no Right to his Clergy, as where he is convict of [q] Hereſy, *&c.* it ſeems to be taken as a Ground by *Staundforde*, That the temporal Judge, where the Ordinary refuſes a Priſoner, has a Power to determine whether ſtill he may be allowed his Clergy or not. And this ſeems to be ground-

[a] H. P. C. 239, 240. S. P. C 132. Lett. B. Finch of Law 463, 464. Fitz. Coro. 99, 109. Dy. 205 pl. 6. *This ſeems doubtful* 12 Aſſ. pl 15. *Abridged* Fitz. Coro. 117. Cont. Fitz. Coro. 233.

[b] 40 Aſſ. 42. pl 23. *Abridged* Fitz. Coro. 91. Dy. 183. pl. 89. 34 H. 6. 49. pl. 16. *Abridged* Fitz. Coro. 20. Bro Cler. 1.

[c] H. P. C. 239. Supra Ch. 30. Sect. 24.

[d] 9 E. 4. 28. 8 H. 4. 3 pl. 5. *Abridged* Fitz. Coro. 72.

[e] 34 H. 6. 49. pl. 16. *Abridged* Fitz. Fitz. Coro. 20. Bro. Cler. 1. H. P. C. 239, 240. Dy. 205. pl. 5, 6. S. P. C. 132. Lett. B. Compt. Juriſd. 126. a.

[f] S P. C. 132. Lett. B. H. P. C. 240. Cro. Juriſd. 126. a.

[g] *As it ſeems from* Dy. 205. pl. 5, 6. Bro B. 3. c. 9. Weſt. 1. ch 2. 2 In. 163, 164. S P. C. 130. b. 9 E. 4. 28. 12 Aſſ. pl. 15. 34 H. 6. 49. pl. 16. Kely. 99.

[h] S. P. C 131. b. 132, 133. Hob. 289, 290. Fitz Coro. 117. Bro. Clergy, 1. 9. *See the following Section But this Matter ſeems to be left doubtful,* 12 Aſſ pl. 15. *Abridged* Bro. Clergy, 9. 34 H 6. 49 pl. 16. Kely. 99 Fitz. Coro 44, 120, 191. 9 E. 4 28. F. N. B. 66. Lett. B.

[k] Vide ſupra, Sect. 9. Fitz Coro 112, 120. S. P. C. 133. b. 27 Aſſ. pl. 42. *Abridged* Fitz. Coro. 205.

[l] S. P. C. 131. b. Fitz. Coro. 191, 254. 26 Aſſ. pl 19. H P. C. 239. Bro. Clergy, 1, 9. Coro. 73. Hob. 288, 289.

[m] Vide ſupra, Sect. 2 Hob. 288

[n] Vide Supra, Sect. 2, 110. Hob. 288.

[o] Vide 1 E. 3. 13. pl. 8. 1 Aſſ pl. 4. *Abridged* Fitz. Coro. 155. Bro. Cler. 8. *Where the Court refuſed to deliver to the Ordinary a Clerk who had abjured, till he ſh uld get the King's Pardon of his Return into the Land without Licence. See* Kely. 28.

[p] S. P. C. 133 Lett. B. Supra Sect. 9.

[q] S. P C 133. Lett. B. *But* 21 E. 4. 21. pl. 1. *Abridged* Bro. Clergy, 18. 9 E. 4. 28 pl. 41. *Abridged* Bro. Clergy, 7. *ſeem to be contrary where the Ordinary aſſigns no particular Cauſe of Refuſal.*

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ed on good Reaſon; for otherwiſe in ſuch Caſes the Ordinary by ſuch Pretences might have an abſolute Power of controlling the Temporal Courts in a Matter properly determinable by ſuch Courts. And therefore whatever Point it may turn upon, whether a Priſoner ought to have his Clergy or not, as the Validity of his Letters of Orders, or his being a Heretick convict, *&c.* howſoever the Temporal Courts may pay the higheſt Regard to the Certificate of the Ordinary; yet I take it to be generally [a] holden, That they only are finally to determine whether upon the whole the Priſoner be well intitled to his Clergy, or not, becauſe the Ordinary is not in this Reſpect eſteemed as a Judge, but [b] only as a Miniſter to the Court. However it was certainly the [c] ſettled Practice (while the Method of trying the Priſoner's Capacity of receiving Orders was by putting him to read a Verſe,) for the Judges of the Common Law to over-rule the Ordinary as to the Point, Whether the Priſoner read as a Clerk or not; and to record a *Legit* or *Non legit*, according to their own Judgment.

Sect. 114. But the neceſſity of ſuch an Ability to read in the Caſe of a Peer, was taken away by 1 *E.* 6. * 12. *Par.* 15. by which it is enacted, *That in every Caſe where any of the King's Subjects ſhall upon his Prayer have the Privilege of his Clergy*, &c. *every Lord having Place and Voice in Parliament, ſhall by Vertue of that Act, of Common Grace, upon his Requeſt or Prayer, alledging that he is a Lord or Peer of this Realm, and claiming the Benefit of this Act tho' he cannot read, without any burning in the Hand, loſs of Inheritance, or corruption of Blood be judged, deemed, taken and uſed for the firſt Time only, to all Intents, Conſtructions and Purpoſes, as a Clerk convict, and ſhall be in Caſe of a Clerk convict, which may make Purgation, without any further or other Benefit or Privilege of Clergy, to any ſuch Lord or Peer from thenceforth, at any Time after, for any Cauſe to be allowed*, &c.

Sect. 115. The neceſſity of ſuch reading is alſo taken away, as to every common Perſon, by 5 *Annæ* 6. by which it is enacted, *That if any Perſon convict of ſuch Felony, for which he ought to have the Benefit of Clergy, pray the Benefit of that Act, he ſhall not be required to read, but ſhall be puniſhed as a Clerk convict.*

Sect. 116. As to the ſixth general Point of this Chapter, *viz.* How far the Ordinary was puniſhable at Law for demanding or refuſing a Clerk againſt Law: It ſeems agreed, [d] That anciently this was ſuch a Contempt for which his Temporalities might be ſeiſed: But ſince the Statute of 25 *E.* 3. 6. which provides, *That Prelates ſhall be admitted to pay a reaſonable Fine for Contempts to Writs of* Quare non admiſit, *and ſuch like*, it ſeems to have been generally [e] agreed, That the Ordinary is liable only to be fined; but to no ſuch Seizure for a Contempt of this kind, as in obſtinately [e] perſiſting to return that a Priſoner reads as a Clerk, or the contrary, *&c.* againſt the declared Senſe of the Court.

[a] Hob. 290. *See the Notes to the other Parts of this and the foregoing Section, yet* 9 E. 4. 28. *Abridged* Bro. Clergy, 7. *This Matter ſeems to be left doubtful.* Vide Fitz. Coro. 44. F. N. B. 66. Letter B.

[b] 7 E. 4. 29. pl. 12. *Abridged* Fitz. Fines, 24. Bro. Clergy, 17. Ordinary, 16. 34 H. 6. 49. pl. 16. *Abridged* Fitz. Fines, 19. Bro. Clergy, 1. 7 H. 4 41. pl. 6. *Abridged* Bro. Clergy, 2. Ordinary, 20. 15 H. 7. 9. pl. 8. *Abridged* Fitz. Impriſonm. 28. Bro. Ordinary, 11. Kely. 89 51. Finch of Law 463, 464. S. P. C. 131. Lett. C. 132. Lett. A. B. C. D. 133. Lett. A. B. C. D. 141 Lett. B. H. P. C. 240.

[c] Kely. 28, 51. 9 E. 4. 28. pl. 41. *Abridged* Fitz. Coro 32. 21 E. 4 21. pl. 1. *Abridged* Bro. Clergy, 18. Bro Ordin. 12. *See the Caſes cited to the precedent Letter.*

[d] Fitz Coro. 32, 191. 233, 9 E. 4. 28. pl. 41. Vide 21 E. 3. 3. pl. 7. Bro. Contempt 19. S. P. C. 129, b. 130. Letter D. Hob. 290. 2 Inſt. 164. *See the Notes under the next Letter.*

[e] 9 E. 4. 28. a. *Abridged* Fitz. Coro. 32. Bro. Clergy, 7. 7 E. 4 29. pl. 12. *Abridged* Fitz. Fines 24. Bro. Clergy 17. Ordinary, 16. 34 H. 6 49. pl. 16. *Abridged* Fitz. Fines, 19. Bro. Clergy, 1. 15 H. 7. 9. pl. 8. *Abridged* Fitz Impriſonm. 28 Bro. Ordinary, 11. Kely. 28, 51. Finch of Law, 463. 2 Inſt. 164. *Yet ſee the contrary holden the very next Year*, 26 Aſſ. pl. 19. *Abridged* Fitz. Coro. 191. *And alſo* 7 H. 4. 41. pl. 6. *Abridged* Bro. Clergy, 2. Ordinary, 20. And S. P. C. 132. Lett. D.

[f] *See the Books cited to the other Parts of this Section.*

Sect. 117. As to the seventh general Point of this Chapter, *viz.* In what Manner a Clerk was to be delivered to the Ordinary, and afterwards demeſned by the Common Law? It ſeems [a] plain, That anciently wherever a Clerk was delivered to the Ordinary by a temporal Judge, his Perſon ought to be kept in the Ordinary's Priſon, till [b] he had been tried before him by a Jury of twelve Clerks; for the Clergy never pretended to an abſolute Exemption from all kind of Puniſhment for their Crimes, but only to a Privilege of being tried only by Eccleſiaſtical Judges; and this was antiently ſo far indulged them, that after they had been once delivered to the Ordinary, they could not afterwards be remanded to any temporal Court, before the Statute of 8 *Eliz.* 4. ſet forth more at large *Section* 122, *&c.* either for the ſame Crime wherewith they had been charged in ſuch Court, nor for any other [c] committed before the Time when the Benefit of the Clergy was allowed them, whether ſuch other Crimes were within the Benefit of the Clergy or not. And if they could acquit themſelves on their Trial before the Ordinary of the Crimes for which they had been arraigned in the Temporal Courts, which Acquittal was called a Purgation, [d] they anciently claimed a Right not only to be delivered out of Priſon, but alſo to be reſtored [e] to their Goods, *&c.* But to render ſuch Purgation the more difficult, and alſo to delay the Delivery of Great Offenders as much as poſſible, the Judges anciently often refuſed [f] to deliver them to the Ordinary till they had been arraigned for all the Crimes whereof they ſtood indicted. But after the Statute of [g] 25 *E.* 3. the Judges could not refuſe the Delivery of Clerks Convict in Reſpect of any Crime whereof they had not been actually arraigned; and therefore they uſed to arraign them at once for all the Crimes whereof they ſtood indicted.

Sect. 118. And if ſuch Clerks could not purge themſelves upon ſuch a Trial, I do not [h] find that they were anciently liable to any greater Puniſhment than Degradation, and the [i] Loſs of their Goods, and the Profits of their Lands, unleſs they had been guilty of Apoſtacy, *&c.* But afterwards, [k] by a Provincial Conſtitution, if they were notoriouſly ſcandalous, they were to be kept in perpetual Priſon, on ſlender Diet, *&c.*

Sect. 119. If the Ordinary had refuſed to admit a Clerk delivered to him to make his Purgation, he might be compelled [l] by a ſpecial Writ for that Purpoſe.

Sect. 120. But this Privilege was often very much abuſed; and therefore after the Statute of *Weſtminſter*, 1. *Ch.* 2. which requires that no Clerk ſhall be delivered without due Purgation, the Courts of Common Law would never deliver over a Clerk to the Ordinary, without a [m] previous Inquiry into or Trial of his Crime, whereupon if the Clerk were found Guilty, he abſolutely forfeited his Goods, and the Judges would [n] often in their Diſcretion make a Special Delivery, *abſque purga-*

[a] Bract. lib. 3, c 9. S.P.C. 137.C.

[b] *See the Statute of* Weſt. 1. ch. 2. 2 Inſt 163, 164. S P. C. 137. Lett. C. 138. Lett. A B.

[c] *If the Ordinary ſuffered a Clerk to go at large without making ſuch Purgation, he might be fined by the temporal Courts.* 15 H. 7. 9 pl 8. 9 E. 4 28. a.

[d] *And this Priviledge was expreſsly confirmed* 25 E 3. ch. 5. *and appears from the recital of* 8 E. 4. Vide Dyer 214. pl. 48. 215. pl 49. H. P. C. 213, 249, And 114. S P. C 108. Lett. A. Finch of Law 464. Poph. 107.

[e] Finch of Law, 464, 465.

[f] H. P C. 241. 5 Co. 110. b. S. P. C. 185. *In the Regiſter*, 68. b. *there are three Writs to this Purpoſe.* S. P. C. 52. Lett. C. 185, 192. Lett. B. 193. Reg. 68. b. Vide 1 Rich. 3. ch. 3.

[g] Fitz. Coro. 394, 461.

Bro. Clergy, 24, 30. S. P. C. 66 Lett. D. 108. Lett. A. H. P. C. 213. Bro. Coro. 11. Lett. A. 142. Lett. B. Dy. 214, 215.

[h] Bract. Lib 3. c. 9. Sect 2. S. P. C. 138. Lett. B 241. 5 Co. 110. b. Bracton *and* Staundforde *in the Places cited to the precedent Letter ſeem to hold generally, That Degradation was the only Puniſhment; but I ſuppoſe that they mean the only Puniſhment to the Perſon* 140, 141. *See* Cro. Ja. 431.

[i] Bract. Lib 3. cap. 9. Sect. 3. S. P. C. 137. Lett. C. 138. Lett. A. 15 H. 7. 9 pl. 8. Cro. Jac. 431. Bro. Coro. 223. Hob. 289.

[k] S. P. C. 108. [l] H. P. C. 240. [m] Vide ſupra, Sect. [n] 2 Inſt. 165.

tione facienda; as where it appeared that a Prisoner was a common [a] Thief. *&c.* or where in an Appeal of Robbery a Restitution of the Goods stolen had been awarded [b] to the Appellant, which Judgment they would not suffer to be contradicted by a Purgation. And both in such a Case, and also *a fortiori* where a Clerk is admitted to his Clergy after an Attainder, whether by an express Judgment or by Outlawry, *&c.* or even after a Confession [c], though he were not specially delivered *absque purgatione facienda*, the Ordinary seems by the stronger * Opinions to have been liable to an Escape, if he had admitted him to his Purgations because it could not but contradict a Judgment, or the Party's own Confession, which is the highest Conviction. Neither was any Purgation thought lawful without a previous Notice to the [d] King of the Time when it was intended to be made.

[a] S. P. C. 139. Lett. D. Hob. 289. Fitz. Coro. 247.
[b] Finch of Law, 464
S. P. C. 139. Lett. B. Fitz Coro. 109, 247.
[c] *But this is left a Quære,* S. P. C 138. Lett. E. 139 Lett. A. *but it seems agreed, That a Clerk might be admitted to his Purgation after a Conviction by Verdict.* Fitz. Coro. 393. 5 Ass. pl. 5. *Abridged* Fitz. 145. Cont. Fitz. Coro. 417.
* S. P. C. 48, 138. Lett. C. 27 H. 6. 7. b. *Abridged* Fitz. Coro. 16. 13 E. 4. 3. pl. 6. *Abridged* Bro. Coro. 158. Fitz. Coro. 38. 3 H. 7. 12. pl. 5. *Abridged* Fitz. Coro. 56. 136. 9 E. 4. 28. a. *Abridged* Bro. Coro. 55. Bro. Coro. 4. Finch 464, 465. Cont. Hob. 289. Fitz. Coro. 109, 128, 450, 247. 18 Ass. pl. 13 *Abridged* Fitz. Coro. 176. Utlagary, 2. Theloal, B. 1. ch. 15. Sect. 26.
[d] Finch, 464. S. P. C 138. Lett. B. Fitz. Coro. 152.
[e] H. P. C. 240.
[f] Kely. 25.

Sect. 121. As to the eighth general Point of this Chapter, *viz.* What shall be done to one who is allowed the Privilege of the Clergy at this Day, and how far it shall be for his Benefit: It is enacted by 4 *H.* 7. 13. *That if any Person, not in Orders, shall be convict of Murder, he shall be mark'd with an* M. *and if of any other Felony, with a* T. *on the Brawn of the Left Thumb, in open Court, before he shall be delivered to the Ordinary.* And it is said by [e] *Hale*, That by 3 *H.* 7. 1. A Clerk convicted of Manslaughter shall be committed, or bailed at Discretion till the Year be passed. But the contrary hath been [f] adjudged; for the said Statute mentions only those who are acquitted of Murder at the King's Suit, within the Year and Day, in which Case it directs that they shall be committed or bailed, till the Year and Day be passed, that they may be forthcoming, in order to answer to an Appeal, if brought within that Time. But it admits the Clergy once had to be a good Bar to an Appeal, even after an Attainder, and therefore cannot be thought to have intended to make Provision in any Case for the Parties being forthcoming to answer an Appeal after Clergy hath been allowed him, which makes it ineffectual. But it is certain that any Person who hath his Clergy may be committed for any Time within a Year by 18 *Eliz.* 7. *Par.* 3. set forth more at large, *Sect.* 125.

Sect. 122. It is recited by 8 *Eliz.* 4. *Par.* 3. *That divers Persons had oft-times committed sundry detestable Felonies, for the which Clergy is not allowable, and afterwards had fled to Places remote where they were not known, and committed some other Felony within the Benefit of the Clergy, and being arraigned for the same had had their Clergy allowed them, and thereupon been committed to the Custody of the Ordinary, the former Offence being then not known, and so by that Means could not after be impeached for the same, to the great encouraging of Offenders, using such Practices of Fore-knowledge and set Purpose, for their Discharge of the same.*

Sect. 123. *For reformation whereof it is enacted, That every Person or Persons, who shall hereafter upon his or their Arraignment for any Felony, be admitted to the Benefit of his Clergy, and delivered to the Ordinary for the same, and shall make his due Purgation for the same Offence or Offences, whereupon he was so admitted to his Clergy, and shall before the same Admission to his Clergy, have committed any other such Offence, whereupon Clergy is not allowable, and not being thereof indicted and acquitted, convicted, or attainted or pardoned, shall and may be indicted or appealed for the same, and thereupon put to answer, and ordered and used in all Things according to the Laws and Statutes of this Realm, in such like Manner and Form, as tho' no such Admission of Clergy had been, Law, Custom, or Usage to the contrary notwithstanding.*

Sect. 124. *And for the avoiding of ſundry Perjuries and other Abuſes, in and about the Purgation of Clerks Convict, delivered to the Ordinaries, it is enacted by* 18 Eliz. 7. *That every Perſon, who ſhall be admitted to his Clergy, ſhall not thereupon be delivered to the Ordinary, but after ſuch Clergy allowed, and burning in the Hand, according to the* [a] *Statute in that behalf provided, ſhall forthwith be enlarged and delivered out of Priſon by the Juſtices before whom ſuch Clergy ſhall be granted, that Cauſe notwithſtanding.*

[a] 4 H. 7. 13. for which ſee Sect. 121.

Sect. 125. But it is provided, Par. 3. *That the Juſtices before whom any ſuch Allowance of Clergy ſhall be had, ſhall and may for the further Correction of ſuch Perſons to whom Clergy ſhall be allowed, detain and keep them in Priſon for ſuch convenient* [b] *Time, as the ſame Juſtices in their Diſcretions ſhall think convenient, ſo as the ſame do not exceed one Year's Impriſonment.*

[b] 2 Bulſt. 137.

Sect. 126. And it is farther provided, Par. 5. *That all Perſons admitted to their Clergy, ſhall notwithſtanding ſuch Admiſſion, be put to anſwer to all other Felonies whereof they ſhall be indicted or appealed, and not being thereof before acquitted, convicted, attainted or pardoned, and ſhall in ſuch Manner and Form be arraigned, tried, adjudged, and ſuffer ſuch Execution for the ſame, as they ſhould have done, if, as Clerks Convict, they had been delivered to the Ordinary, and there had made their Purgations; any thing in this Act contained to the contrary notwithſtanding.*

Upon theſe Statutes the following Points ſeem moſt remarkable,

Sect. 127. *Firſt*, Inaſmuch as it plainly appears, not only from the Preamble, but alſo from the expreſs Words of the above-recited Clauſe of 8 *Eliz.* 4. That it had nothing elſe in View but only to prevent the Inconvenience that Offenders ſhould be diſcharged of Crimes not within the Benefit of the Clergy, by being admitted to their Clergy for Crimes within the Benefit of it, as they were [c] before this Statute; and inaſmuch as the above-recited *Proviſo* of 18 *Eliz.* 7. tho' it be more largely worded than 8 *Eliz.* 4. hath a plain Relation to it, and therefore may reaſonably receive the ſame Conſtruction; it ſeems to have been agreed [d] ever ſince theſe Statutes, That a Conviction for a Felony within the Benefit of the Clergy, and an Allowance of Clergy thereon, is as much a Diſcharge of all precedent Felonies within the Benefit of the Clergy (tho' not of any others) as it was before theſe Statutes.

[c] Vide ſupra, Sect. 117.

[d] H.P.C. 213, 249. 1 And. 114. Poph. 107.

Sect. 128 *Secondly*, Inaſmuch as the Statute of 18 *Eliz.* 7. is expreſs, *That every Perſon admitted to his Clergy, ſhall not be delivered to the Ordinary, but after ſuch Clergy allowed, and burning in the Hand, ſhall forthwith be enlarged and delivered out of Priſon*, &c. *with a* Proviſo *nevertheleſs, that for further Correction he may be kept in Priſon*, &c. *and alſo with a farther* Proviſo, *that he ſhall anſwer to all former Felonies, in the ſame Manner as if he had made his Purgation.* It ſeems to be the more prevailing Opinion, [e] That a Clerk Convict being admitted to his Clergy, may either be taken to have a kind of a Statute-pardon, or elſe to be in the ſame Caſe as if he had made his Purgation at the Common Law. And both of theſe Conſtructions ſeem reaſonable. For as to the firſt it may be ſaid, That the Statute by ordaining that the Party ſhall be forthwith enlarged and delivered out of Priſon, under certain *Proviſoes*, ſeems plainly to imply that he ſhall be liable to no other Puniſhment, and conſequently in Effect pardons him. And as to the ſecond it may be ſaid, That the Statute ſeems only to intend to take away the Practiſe of making Purgation, which had been ſo much abuſed, but not the Benefit accruing to the Subject by it

[e] Vide Kely. 37, 102.

it, but rather to make it more universal, by giving the same Advantage to all by a direct and express Law, attended with no Inconvenience, which before some only gained by an usurped Practice, very frequently abused, and highly derogatory from the Honour of the Common Law. But [a] Sir *Edward Coke* is of Opinion, That it shall enure by way of Purgation in Respect of such Persons only who might be admitted to make their Purgation before the Statute, and in Respect of others by way of Pardon. And [b] *Hobart* argues, That because many Offenders before the Statute might have their Clergy, who yet could not be discharged by making their Purgation; and the Statute intends that all in general who are admitted to their Clergy shall be discharged, *&c.* And also because all Purgations discredited a Trial at Law, therefore it is not reasonable to intend that the Statute meant that such a Discharge should enure by way of a Purgation, but only by way of a Statute-pardon. But to this it seems a reasonable Answer, That it doth by no Means follow, that because the Statute intended that such Discharge should extend to Persons who could not have the Benefit of a Purgation, therefore it did not intend that it should have the Effect of a Purgation; neither doth it seem to follow, That because a Purgation discredited the Acts of a Jury, therefore such a Discharge, if it have to some purposes the same Effect as a Purgation, must discredit them likewise.

[a] 5 Co. 110. a. b.

[b] Hob. 292, 293.

Sect. 129. *Thirdly*, Taking the Statute to enure either by way of a Statute-pardon, or Purgation, it seems that it restores [c] the Party to his Credit, and consequently enables [d] him to be a good Witness; which it hath been questioned whether a Pardon by the King can do, as shall be set forth more at large in the Chapter of *Pardon*. Also it seems agreed, That it gives him a Capacity to purchase [e] Goods, and to retain the [f] Profits of his Land, but gives him no Right to be restored to those which he had at the Time of the Conviction, which being vested in the King by the Forfeiture upon the Conviction, [g] shall not be devested either by a [h] Pardon or [i] Purgation. For it is certain that a Pardon never avoids [k] any precedent legal Act, as shall be more fully shewn in the Chapter of *Pardon*. Neither would the Common Law endure that Purgation, which was introduced by a Connivance, or rather tolerated than allowed, should so far control its Proceedings.

[c] H P. C. 241. [d] Kely. 37. Raym. 369, 370, 380. Vide 1 Sid. 222. State Trials, Vol. 2. 523. Vol. 4. 379 *to* 386. 5 Mod. 15.

[c] H.P.C. 241. 5 Co. 110. Hob. 293.

[f] 5 Co. 110. Fitz. Coro. 393. Forfeit. 34.

[g] 12 Co. 121. 5 Co. 110. b. H. P. C. 241. Co. Lit. 391. a. 3 H. 7. 12. pl. 10. Fitz. Coro. 53, 365, 356, 393. Fitz. Forfeit. 23, 34. Bro. Forf. 11. 8 H. 4. 2. b. Plow. Com. 262. b. S. P. C. 185. 20 E 4. 5 pl. 3. Bro. Coro. 166.

Sect. 130. *Fourthly*, Whether the Statute enure as a Pardon or Purgation, it [l] seems to take from the Spiritual Court the Power of depriving the Party for the Crime for which he has had his Clergy. For if it enure as a Pardon, surely it cannot be doubted but that it frees the Party from all subsequent Punishment, and consequently from a Deprivation. And if it enure as a Purgation, which is admitted [m] to have been a good Bar to a Deprivation before the Statute, why should it not have the same Effect as a Purgation had formerly, in this as well as in other Respects. Yet [n] *Watson*, in his *Clergyman's Law*, holds an Opinion on the Authority of [o] *Croke's Second Report*, that a Clergyman may be deprived for Manslaughter after he has had his Clergy, not observing, as I suppose, that what is

[a] 5 Co. 110. a. b. [b] Hob. 292, 293. [c] H P. C. 241. [d] Kely. 37. Raym. 369, 370, 380. Vide 1 Sid. 222. State Trials, Vol. 2. 523. Vol. 4. 379 *to* 386. 5 Mod. 15. [e] H.P.C. 241. 5 Co. 110. Hob. 293. [f] 5 Co. 110. Fitz. Coro. 393. Forfeit. 34. [g] 12 Co. 121. 5 Co. 110. b. H. P. C. 241. Co. Lit. 391. a. 3 H. 7. 12. pl. 10. Fitz. Coro. 53, 365, 356, 393. Fitz. Forfeit. 23, 34. Bro. Forf. 11. 8 H. 4. 2. b. Plow. Com. 262. b. S. P. C. 185. 20 E 4. 5 pl. 3. Bro. Coro. 166. *But it is holden* 40 E. 3. 42. pl. 23. *Abridged* Fitz. Coro. 91. *and* Bro. Forfeit. 5. *That nothing is forfeited unless there be an Attainder, Also 'tis said, that the Profits of Lands are not forfeited*, 20 E. 4. 5. pl 3. Bro. Coro. 166. [h] 1 Saund. 362. 1 Lev. 8. 120. [i] Vide supra Sect. 110. Fitz. Coro. 356. Finch. 464. Cont. Fitz. Coro. 365. Bro. Forfeit. 113. F. N. B. 66. Lett. A. Bro. Clergy, 28. [k] 1 Saund 362. 1 Lev. 8. 120. [l] Hob. 292, 293. 2 Roll. Ab. 305. pl. 3. [m] Cro. Jac. 431. [n] Ch. 6. fol. 35, 36. *in the Folio Edition.* [o] Cro. Jac. 430, 431.

said

ſaid in this Book was only on the ſudden on a Motion for a Prohibition in the King's Bench; and that in the ſame Caſe a Prohibition was afterwards actually brought and declared on in the [a] Common Place, and Judgment thereupon ſolemnly given for the Plaintiff upon open Argument by all the Judges.

[a] Hobart 288. 2 Roll. Abr. 305. pl. 3. *Alſo a Prohibition was granted in the like Caſe*, 27 & 28 Eliz. Rotulo 2574. *cited.* Hob. 294.

Sect. 131. *Fifthly*, It ſeems agreed, That where a Perſon exempt from burning in the Hand, (either in Reſpect of his [b] Peerage or [c] Orders, or [d] Special Pardon,) is admitted to the Benefit of his Clergy, he ſhall have the ſame Advantage of the Statute without being burnt in the Hand, as others ſhall have upon ſuch burning; for the Words of the Statute, that the Party *after ſuch Clergy allowed, and burning in the Hand, ſhall be enlarged*, &c. ſhall have this Conſtruction, That he ſhall be enlarged, *&c.* upon burning where burning ought to be.

[b] 1 Lev. 180. [c] Hob. 294. [d] 5 Co. 110. b.

Sect. 132. It is holden, That after a Man is admitted to his Clergy, it is [e] actionable to call him Felon, *&c.* becauſe his Offence being pardoned by the Statute, all the Infamy and other Conſequences of it are diſcharged.

[e] Hob. 294. Vide Hob. 67. 81. 1 Danv. 163. pl. 6 *and the Chapter of Pardon.*

Sect. 133. How far a Perſon convicted of a Crime within the Clergy, and praying or being ready to pray it, but not actually admitted to it, ſhall be within theſe Statutes ſhall be conſidered, *Ch.* 37.

Sect. 134. It is enacted by 5 *Annæ* 6. *That where any Perſon ſhall be convict of Larceny, the Judges ſhall at their Diſcretion award him to the Workhouſe, or Houſe of Correction, there to be kept without Bail, not leſs than ſix Months, nor more than two Years from the Conviction; an Entry whereof is to be made of Record*, &c. *And if ſuch Offender eſcape, he ſhall be committed to ſome ſuch Houſe, there to remain not leſs than twelve Months, nor more than four Years*, &c.

Sect. 135. It is enacted by 4 *Geo.* 1. and 6. *Geo.* 23. *That where any Perſon or Perſons ſhall be convicted of* Grand or Petit Larceny, *or any felonious ſtealing or taking of Money, Goods, or Chattels, either from the Perſon, or the Houſe of any other, or in any other Manner, and who by the Law ſhall be intitled to the Benefit of Clergy, and liable only to the Penalties of burning in the Hand or whipping, (except Perſons convicted for receiving or buying ſtolen Goods, knowing them to be ſtolen) it ſhall and may be lawful for the Court before whom they were convicted, or any Court held at the ſame, or any* * *other Place with the like Authority, if they think fit, inſtead of ordering any ſuch Offenders to be burnt in the Hand, or whipt, to order and direct that ſuch Offenders ſhall be ſent, as ſoon as conveniently may be, to ſome of his Majeſty's Colonies, and Plantations in America, for the Space of ſeven Years: And that Court before whom they were convicted, or any ſubſequent Court, with like Authority as the former, ſhall have Power to convey, transfer, and make over ſuch Offenders, by Order of Court, to the Uſe of any Perſon or Perſons who ſhall contract for the Performance of ſuch Tranſportation, to him, or them, and his and their Aſſigns, for ſuch Term of ſeven Years. And where any Perſons ſhall be convicted of any Crimes for which they are excluded their Clergy, and the King ſhall extend his Mercy to them, upon Condition of Tranſportation to any Part of America, and ſuch Intention of Mercy be ſignified by a Principal Secretary of State, it ſhall be lawful for any Court, having proper Authority to allow ſuch Offenders the Benefit of a Pardon, to order and direct the like Tranſportation, to any Perſon (who will contract for the Performance thereof) of any ſuch Offenders, as alſo of any Perſon convict of receiving or buying ſtolen Goods, knowing them to be ſtolen, for the Term of fourteen Years, in Caſe ſuch Condition of Tranſportation be general, or elſe for ſuch other Term as ſhall be made Part of ſuch Condition; and ſuch Perſon ſo contracting, and his Aſſigns, ſhall have an Intereſt in the Service of the ſaid Offenders for ſuch Term of Years.*

* *Viz.* by 6 Geo. ch. 23.

And if any such Offender return into Great Britain *or* Ireland *before the End of his Term, he shall be liable to be punished as any Person attainted of Felony, without the Benefit of Clergy,* &c. *Provided, That the King may pardon and dispense with any such Transportation, and allow of the Return of such Offender, paying his Owner at the Time, such Sum as shall be adjudged reasonable by any two Justices of the Peace where such Owner dwells; and where any such Offenders shall be transported, and shall have served their Terms, such Services shall have the Effect of a Pardon as for the Crimes for which they were transported,* &c.

Sect. 136 And it is farther enacted, That *every such Person to whom any such Court shall order any such Offenders to be transferred or conveyed, shall before such Offenders shall be delivered to them, contract with such Person as shall be appointed by such Court, and shall give sufficient Security to the Satisfaction of such Court, for the transporting such Offenders to some Plantation in* America, *to be ordered by such Court, and the procuring an authentick Certificate from the Governour or Chief Custom-House Officer of the Place, of the Landing of such Offenders,* &c. *and their not returning by the wilful Default of such Contractor.*

Sect. 137. And it is farther enacted by 6 *Geo.* 23. *That the Court may nominate two or more Justices of the Peace for the Place where such Offenders shall be convicted, who shall have Power to contract with any Person or Persons for the Performance of the Transportation of such Offenders; and to order such and the like Security as the said former Act directs to be taken by Order of Court, and to cause such Felons to be delivered to such Contractors; which said Contracts and Security shall be certified by the said Justices to the next Court held with the like Authority, to be filed,* &c.

Sect. 138. And it is farther enacted, *That all Charges in or about such Contracts,* &c. *shall be born by each County,* &c. *for which the Court was held, and that the respective Treasurers shall pay the same. And that all Securities for Transportation shall be by Bond in the Name of the Clerks of the Peace,* &c. *and the Money recovered shall be to the Use of the respective Counties,* &c.

Sect. 139, And it is farther enacted, *That the Persons so contracting,* &c. *may carry such Offenders towards the Sea Port,* &c. *and that if any Person shall rescue such Offenders, or aid them in making their Escape,* &c. *they shall be deemed guilty of Felony, without Clergy. And that if any Felon ordered for Transportation shall be afterwards at large within any Part of* Great Britain, *without some lawful Cause, before the Expiration of his Term, and be lawfully convict thereof, he shall suffer Death without Clergy. And may be tried before Justices of Assise,* Oyer *and* Terminer, *or Gaol-Delivery, for the County where he shall be apprehended,* &c. *or from whence he was ordered to be transported,* &c. *and that the Clerk of Assise, and Clerk of the Peace, where such Orders of Transportation shall be made, shall on Request of the Prosecutor,* &c. *certify briefly a Transcript containing the Tenor of every Indictment, Conviction and Order of Transportation to the Justices of Assise,* &c. *which shall be a sufficient Proof of such Conviction and Order of Transportation.*

2

CHAP.

CHAP. XXXIV.

Of Pleas in Abatement.

AND now I come to *Pleas in Abatement*, which having already considered so far as they particularly relate to Appeals, Indictments, and Informations, in the several Chapters concerning them, and shewn in *Chap.* 23. from *Section* 101. to *Section* 126. what Pleas are good in Abatement of an Appeal; and in *Sections* 126, and 135, That an Appellee may plead as many of them as he pleases, unless they be repugnant to one another, and afterwards take the General Issue; and in *Chap.* 25. *Sect.* 12. That the same Matters may be pleaded to an Appeal on an Arraignment thereon at the Suit of the King, as on an Arraignment at the Suit of the Party, and in the same Chapter, *Sections*, 70, 71, 72, 73. what Misnosmers, *&c.* may be pleaded in Abatement of an Indictment; and in *Chap.* 26. *Sections*, 63, 64, 65. what Pleas are good in Abatement of an Information; and having considered Demurrers in Abatement, *Chap.* 31. *Sect.* 5, 6, 7. I shall in this Place take Notice only of the following Particulars;

Sect. 1. *First*, That it hath been holden [a] that it is no good Plea in Abatement of an Indictment, as it is of an Appeal [b], or Information, [c] that there is another Indictment against the Defendant for the same Offence. But in such * a Case the Court in Discretion will quash the first Indictment if any Fault can be found in it.

Sect. 2. *Secondly*, That where an Indictment of a Capital Crime is abated for a Misnosmer of the Defendant's [d] Christian Name, the Court will not dismiss him, but cause him to be indicted *de novo* [e] by his true Name, and arraign him again on such new Indictment. For I take it to be settled [f] at this Day, That regularly a Defendant shall not be dismissed for an Insufficiency in an Indictment or Appeal for a capital Crime.

Sect. 3. *Thirdly*, That a Defendant appearing *Gratis*, and by Attorney to an Information, may [g] plead a Misnosmer in Abatement, as well as if he had appeared in proper Person; for if he be not the Person intended, the Attorney General may reject the Plea, and sign Judgment on a *nihil dicit*; but if he accept the Plea, he thereby admits him that pleads it to be the Person concerned to make a Defence, and therefore shall not afterwards say that it doth not appear but that the Plea might be put in by a Stranger.

[a] 1 Jon. 199. Cro. Ca. 147. Dorg. 228
[b] Ch. 23. Sect. 124.
[c] Ch. 26. Sect. 63.
* Cro. Car. 147. 1 Jo. 199.
[d] Vide Ch. 25. Sect. 70, 71.
[e] H. P. C. 243. Cro. Ca. 371, 372.
[f] Vide Ch. 23. Sect. 4, 131. Ch. 25. Sect. 9, 10, 11. Cont. 11 H. 4. 41. pl. 7. Fitz. Misnos. 18. Coro. 88. Bro. Misnos. 23.
[g] *See the Books cited* Ch. 23. Sect. 11. Lett. a. *Adjudged* Trin. 4 Geo. *between the* King *and* Westby.

CHAP.

CHAP. XXXV.

Of the Plea of Autrefoits acquit.

PLeas in Chief are either,

1. In Bar, or
2. The General Iſſue.

As to Pleas in Bar, having ſhewn already, *Chap.* 23. *Sect.* 128. what Pleas of this Kind to an Appeal are good, which ſhew that the Plaintiff had never any Right to bring it; and in *Sections* 129, 130, 131. where a *Retraxit*, Nonſuit, Diſcontinuance, or Abatement, of one Appeal may be pleaded in Bar of another; and in *Section* 132. where the bringing of an Appeal againſt one Perſon will be a Bar to a ſubſequent one againſt another Perſon not named in the Firſt; and in *Section* 133. where a Releaſe will bar an Appeal; and in *Section* 134. where an Appellant may be barred as to one Appellee, and continue his Suit againſt the reſt; and in *Section* 135. what Pleas of this Kind are conſiſtent with the General Iſſue, and in *Ch.* 26. *Sect.* 64, 65, what is a good Plea in Bar to an Information, I ſhall in this Place only conſider,

1. The Plea of *Autrefoits acquit.*
2. The Plea of *Autrefoits attaint* or *convict.*
3. The Plea of a Pardon.

Sect. 1. And firſt of the Plea of *Autrefoits acquit*, which is grounded on this *Maxim*, [a] That a Man ſhall not be brought into Danger of his Life for one and the ſame Offence, more than once. From whence it is generally taken, by all the Books, [b] as an undoubted Conſequence, that where a Man is once found Not guilty on an Indictment or Appeal free [c] from Error, and [d] well commenced before any [e] Court which hath Juriſdiction of the Cauſe, he may by the Common Law in all [f] Caſes whatſoever plead ſuch Acquittal in Bar of any ſubſequent Indictment or Appeal for the ſame Crime. But for the more diſtinct underſtanding hereof I ſhall particularly conſider,

[a] S.P. C. 105. Lett. A. 4 Co. 40. a. 45. a. 47. a. 9 H. 7. 19. pl. 14. Fitz. Pard. 3. Bro. Appeal, 9, 12, 89. Coro. 11. Cromp. Juſt. 111. pl. 1.

[b] *See the Authorities cited to all the other Parts of this Chapter, and* 5 E. 3. 25. pl. 36.

[c] Vide infra Sect. 8.

[d] Vide infra Sect. 9.

[e] Vide infra, Sect. 10.

[f] 25 E. 3. 44. pl. 16. *Abridged* Fitz. Coro. 136. 41 Aſſ. 9. *Abridged* Fitz. Coro. 220. Bro. Coro. 120 *or* 121. 2 Leon. 161. Vide infra, Sect. 14, 15. 47 E. 3. 16. pl. 27. *Abridged* Fitz. Coro. 104. Bro. Appeal, 14.

1. How far he who pleads this Plea muſt be ready to produce the Record of his former Acquittal.

2. Where a Variance between the Record of the former Acquittal and the Indictment or Appeal to which it is pleaded, may be helped.

3. How far other Diſcharges of a former Proſecution have the ſame Effect as an Acquittal by Verdict.

4. How far it is neceſſary that the Indictment or Appeal in the Record of Acquittal be free from Error, and well commenced.

5. Whether an Acquittal in any Court which has a Juriſdiction be ſufficient for this Purpoſe.

6. How far an Acquittal of a Perſon as Principal will bar a ſubſequent Proſecution againſt him as Acceſſary, *& e converſo*, how far a an Acquittal of a Man as Acceſſary will bar a Proſecution againſt him as Principal.

7. How far the Law is altered in theſe Reſpects as to an Indictment of Death, by 3 *H.* 7. 1.

Sect. 2. As to the firſt Particular, *viz.* How far he who pleads this Plea muſt be ready to produce the Record of his former Acquittal, I take it to be [a] agreed, That ſuch Plea being a Plea in [b] Bar, and the Record not in the Cuſtody of, nor the Property of him that pleads it, there is no need to plead with a *profert ſub pede ſigili*; but the Defendant ſhall have a [c] Day given him to bring it in. And there is in *Brook* a Note of a [d] Caſe in the Time of *Edw.* 3. wherein a Plea of *Autrefoits acquit* was diſallowed, becauſe the Defendant ſhewed forth the Record when he pleaded it; and the Book gives this Reaſon, That *the Record ought to come before the Court by Writ.*

Sect. 3. As to the ſecond Particular, *viz.* Where a [e] Variance between the Record of the former Acquittal, and the Indictment or Appeal to which it is pleaded may be helped: I take it to be clear, That if the Nature of the Crime be in [f] Subſtance the ſame, a Variance may generally be helped by proper [g] Averments. And therefore if a Man be named in the firſt Record *Yeoman*, and in the ſecond *Gentleman*, yet it ſeems [h] clear, that he may make good the Variance, with an Averment that he only was meant under each Addition. Alſo if a Man be acquitted of an Indictment of Murder or Robbery *cujuſdam* [i] *igneti*, and afterwards arraigned on an Indictment for the ſame Fact, deſcribing the Perſon killed or robbed by his proper Name; yet it hath been holden, [k] That he may plead the Acquittal in Bar, averring that both the Indictments are for the very ſame Felony. Alſo if the Perſon killed be deſcribed by his proper Name and Surname in the firſt Indictment, and by the ſame Chriſtian, but by a different Surname in the ſecond, yet it hath been [l] adjudged, That he may plead an Acquittal on the firſt in Bar of the ſecond Indictment, averring that the Perſon ſo differently named was one and the ſame Perſon. But it ſeems [m] adviſeable in ſuch Caſe to add a farther Averment, That the Perſon killed was known as well by the Name in the firſt, as by that in the ſecond Indictment; for if he were never known by the Name in the firſt Indictment, I much queſtion whether the Defendant cou'd be found guilty upon it; and if he cou'd not, it ſeems plain that his Life having never been in danger by it, the Acquittal upon it [n] cannot be any Bar to a ſubſequent Indictment. But if there be no other Variance between the firſt and ſecond Indictment but only as to the [o] Times when the Crime is alledged to have been committed, or as to the [p] Places being both in the ſame County, there is no doubt but

[a] S. P. C. 105. Lett. A. H. P. C. 245. Fitz. Coro. Fitz. monſtrans de faits 33. Vide Raſt. Entr. 385. pl. 4. *ſeems contrary.*

[b] Co. Litt. 128. *See the Chapter of Pardon.*

[c] Co. Lit. 128. b. Fitz. Coro. 232.

[d] Bro. Coro. 218. *But* 26 Aſſ. pl. 15. *Abridged* Fitz. Coro. 189.

11 H. 4. 41. pl. 6. *Abridged* Fitz. Moſtrans de faits 128. Bro. Coro. 29. 9 H. 7. 19. pl. 14. *Abridged* Bro. Appeal, 89. *ſeems contrary.*

[e] Vide 2 Keb. 705. pl. 71.

[f] 14 H. 7. 2. pl. 8. S. P. C. 168. Lett. B.

[g] S. P. C. 105. H. P. C. 246.

[h] Vide Keil. 58 a.

[i] Vide ſupra, Ch. 25. S. 73.

[k] Keilw. 25. b. Dy. 285. pl. 38. Vide Fitz. Coro. 159.

[l] 26 Aſſ. pl. 15. *Abridged* Bro. Coro. 198. Fitz. Coro. 189. Crompt. Juſt. 112. pl. 12. S. P. C. 105. Letter C. Vide 11 H. 4. 41. pl. 6. *Abridged* Fitz. Monſtrans de faits, 128. Bro. Variance 31. Coro. 29. 1 Roll. Rep. 368. pl. 22. [m] Vide H. P. C. 246. S. P. C. 105. Lett. C. Crompt. Juſt. 112. pl. 12. [n] Vide ſupra, Sect. 1. & infra Sect. 8. 9, 10. [o] Dy. 285. pl. 38. H. P. C. 246. Vide 22 Aſſ. pl. 55. *Abridged* Fitz. Coro. 179. S. P. C. 105. Lett. C. 11 H. 4. 41. pl. 6. *Abridged* Bro. Coro. 29. Variance 31. Fitz. Monſtrans de faits 128. 25 E. 3 44 pl. 16. *Abridged* Fitz. Coro. 136. 3 Aſſ. pl. 15. *Abridged* Fitz. Coro. 166. Crompt Juſt, 112. pl. 13. [p] H. P. C. 246. S. P. C. 105. Lett. C. 106. Lett. A

that regularly it may be help'd by an Averment, that the Felony in both is one and the ſame, becauſe neither the Time nor Place laid in an Indictment, *&c.* are material upon Evidence, ſo that the Defendant be proved guilty at any other [a] Time before the Indictment, or at any other Place [b] within the County. And it is holden by [c] *Staundforde*, That an Acquittal of Murder in one County may be pleaded in Bar of a ſubſequent Indictment in another County for the ſame Murder. But this ſeems queſtionable, becauſe all Indictments are local; and therefore if the firſt were laid in an improper County, the Defendant could not be found guilty upon it, and conſequently was in no danger of his Life, and therefore [d] cannot plead an Acquittal upon it in Bar of a ſubſequent Indictment in the proper County: But if the firſt Indictment were in the proper County, the ſecond cannot but be in an improper one, and conſequently the Defendant not being liable to be found guilty upon it, cannot be ſaid to be reduced by it to the Inconvenience of being twice brought into danger of his Life for one and the ſame Offence, the avoiding of which Inconvenience [e] ſeems the Chief Inducement for which the Law allows the Plea of *Autrefoits acquit.*

Sect. 4. But if a Man ſteal Goods in one County, and then carry them into another, in which Caſe it is certain [f] that he may be indicted and found guilty in either, it ſeems very reaſonable, that an Acquittal in the one County for ſuch ſtealing may [g] be pleaded in Bar of a ſubſequent Proſecution for the ſame ſtealing in another County, becauſe the Defendant may be altogether as well convicted in the one County, as in the other; and therefore if he could not bar the ſecond Proſecution by the Acquittal on the firſt, his Life would be twice in danger from that which is in Truth but one and the ſame Offence, and only conſidered as a new one by a meer Fiction or Conſtruction of Law, which ſhall hardly [h] take Place againſt a Maxim made in favour of Life. And as to the [i] Objection, That the Jurors of the one County can take no Manner of Conuſance of what is done in the other, and conſequently cannot try whether the Felony whereof the Party is indicted in the ſecond County be the very ſame with that of which he was acquitted in the firſt, it may be anſwered, That it appears from the old Books, that anciently the Judges often ſatisfied themſelves of the Truth of an Averment that the Offences in both Indictments were the ſame, by [k] Witneſſes, or by an [l] Inqueſt of Office, without putting it to a Trial by Jury, upon an iſſue joined, on the Denial thereof by the Proſecutor, which ſeems [m] to have been of later Years the uſual Method. But granting that it is to be tried by ſuch Jury, I do not ſee how it follows, That becauſe they cannot convict a Defendant upon Evidence of a Fact done out of their own County, therefore they cannot collaterally inquire whether an Offence laid in their own County be in Subſtance the ſame with that done in another, ſince it cannot be denied but that in abundance of Caſes a Jury of one County may receive Evidence of Facts done in another. To which may be added, That in the *Year-Book* of 4 *H.* 7. 5. *pl.* 1. which is the [n] Chief Authority for the contrary Opinion, it is admitted that an Acquittal on an Appeal of Larceny in the one County, may be pleaded in Bar of a ſubſequent Appeal in the other; becauſe ſuch an Appeal intitles the Plaintiff to a Reſtitution of the Goods, whereof being once

[a] H. P. C. 264. Salk. 288.
[b] *See the Chapter of Evidence; and* H. P. C. 264.
[c] S. P. C. 105. Lett. C. *See* Crompt. Juſt. 112. pl. 9.
[d] Vide Sect. 1, 8, 9, 10.
[e] Supra, ſect. 1, 8, 9, 10.
[f] Supra Ch. 23. Sect. 47. Ch. 25. Sect. 36. *and* B. 1. Ch. 33. Sect. 9.
[g] 41 Aſſ. pl. 9. Fitz. Coro. 220. *But this is left doubtful* S. P. C. 105. Lett. C. 106 Lett. A. H. P. C. 246. Crompt. Juſt. 112. pl. 9. Bro. Coro. 139 or 140. 4 H. 7. 5. pl. 1. Fitz. Coro. 62.
[h] Vide ſupra, Ch. 18. Sect. 13. *and* Ch. 19. Sect. 25. *and* Ch. 29. Sect. 35.
[i] 4 H. 7. 5 pl. 1. Fitz. Coro. 62.
[k] 26 Aſſ. pl. 15. *Abridged* Fitz. Coro. 189. Bro Coro. 98.
[l] 41 Aſſ. pl. 9 *Abridged* Fitz. Coro. 220.
[m] 3 Aſſ. pl. 15. *Abridged* Fitz. Coro. 166.
[n] Vide Bro. Coro. 139 or 140.

See the ſixth Section. Fitz. Coro. 62. S. P. C. 106. H. P. C. 246. [m] 9 H. 7. 19. pl. 14. *Abridged* Bro. Appeal, 89.

bar-

barred he is barred for ever. But granting this to be a good Reaſon, which yet it ſeems difficult to make out, the very ſame may be ſaid at this Day as to an Indictment, which ſince * 21 *H.* 8. 11. intitles the Proſecutor to a Reſtitution alſo. Beſides, taking the Law as it ſtood formerly, why may not a Jury of one County try whether a Felony therein indicted, be the ſame whereon the Party was before acquitted in another County, in the Caſe of a ſecond Indictment, as well as of a ſecond Appeal?

* Vide ſup. Ch. 23. Sect. 55, 56.

Sect. 5. It ſeems [a] that it is no Plea to an Appeal of Larceny, That the Defendant hath been found Not guilty in an Action of Treſpaſs brought againſt him by the ſame Plaintiff for the ſame Goods; for Larceny and Treſpaſs are entirely different: Alſo it ſeems a general [b] Rule, That a Bar in an Action of an inferior Nature, will not bar another of a ſuperior. Yet it ſeems, [c] That an Acquittal in an Indictment of Murder, will be a good Bar of an Indictment of Petit Treaſon, becauſe both Offences are in Subſtance the ſame. But it is clear that an Acquittal of one Felony is [d] no manner of Bar to a Proſecution for another in Subſtance different, whether committed before or at the ſame Time with that of which he is acquitted; and therefore if a Man commit a Burglary, and ſteal the Goods of *A.* and *B.* and be indicted for the Burglary, and ſtealing the Goods of *A.* and acquitted; it hath been adjudged, [e] that he cannot plead ſuch Acquittal to an Indictment for ſtealing the Goods of *B.* But it ſeems agreed, That he may plead it to a ſecond Indictment for the Burglary.

[a] 2 Ric. 3. 14. a. Bro. Appeal. 121. Vide infra, Ch. 36. Sect. 7. [b] Co. Litt. 146. a. 2 Ric. 3. 14, 15. [c] 3 Inſt. 213. H. P. C. 246. [d] S. P. C. 105. Lett. A. H. P. C. 244. Bro. Coro. 11. [e] Kely. 30, 52.

Sect. 6. As to the third Particular, *viz.* How far other Diſcharges of a legal Proſecution have the ſame Effect as an Acquittal by Verdict: Having ſhewn already in the [f] Chapter of *Appeals*, how far the Diſcharge of one Appeal will bar another, I ſhall only add in this Place, That notwithſtanding the [g] Allowance of a Pardon, or any other Bar of one Indictment, ſeems to be pleadable in Bar of another; and by the like Reaſon, whatever hath been allowed a good Bar of one Appeal may be pleaded in Bar of another: Yet it ſeems that no other Diſcharge of an Indictment will bar an Appeal, and no other Diſcharge of an Appeal will bar an Indictment, but only an [h] Acquittal by Battel, or an Acquittal by Verdict on the general Iſſue, finding the Defendant's [i] Innocence; as where it finds him Not guilty on ſuch an Iſſue, on an Indictmet or Appeal of any Felony whatſoever; or where it finds † him guilty of Homicide *ſe defendendo*, or *per infortunium*, on an Indictment of Murder. But it hath been adjudged, [k] That where a Demurrer by an Appellant to a Tender of Battel, or to a Plea, hath been adjudged againſt him, yet the Appellee may be afterwards arraigned at the Suit of the King.

[f] Ch. 23. Sect. 129, 130, 131. [g] 11 H. 4. 41. pl. 6. *Abridged* Fitz. monſtrans de faits, 128. Bro. Coro. 29. Appeal, 33. Variance, 31. Vide S. P. C. 106. Lett. B.

[h] *See the next Section.* [i] S. P. C. 169. a. † 3 Inſt. 213. Crompt. Juſt. 111. pl. 6. 4 Co. 46. b. [k] Dy. 120. pl. pl. 13. Crompt. Juſt. 112. pl. 18.

Sect. 7. It it ſaid by Sir *Matthew Hale* in the [l] Chapter of *Autrefoits acquit*, That an Acquittal by Battle in an Appeal is no Bar of an Indictment. But I find no other Authority to this Point but a Note in *Fitzherbert* [m] of a Caſe to this Purpoſe in the Time of King *Edward* the Second. To which it may be anſwered, That this Matter is only ſpoken of incidently, and not adjudged. And that *Staundforde* in the ſame Place [n] where he cites it, makes a *Quære* whether it be Law or not, And it is expreſly holden by *Bracton*, [o] That an Appellee who vanquiſhes the Appellant in Battel, ſhall go quit not only from all other Appeals, *but alſo from the Suit of the King; becauſe by this he clears his Innocence againſt all, in the ſame manner as if he had put himſelf upon his Country and his Country had acquitted him.* Alſo it is admitted by Sir *Matthew Hale* in the

[l] H. P. C. 245. [m] Fitz. Coro. 375. [n] S. P. C. 106. Lett. D. [o] Lib. 3. cap. 19. Sect. 8.

[a] H. P. C. 200. Vide supra, ch. 25. Sect. 10. Lett. *r.* 21 H. 6. 34. pl. 1. S. P. C. 148. Lett. B. [b] Fitz. Coro. 98. S. P. C 168. Letter E. Supra ch. 23. Sect. 149. [c] S. P. C. 169. Supra ch. 23. Sect. 140. [d] 4 Co. 45. a. 47. a. H. P. C. 244, 245. 3 Inst. 214. Fitz. Coro. 444. Supra ch. 23. Sect. 140. Crompt. Just. 112. pl 14, 15, 16, 19. 20 H. 11. b. 12. a. 9 H 5. 2 pl. 7. *Abridged* Bro. Appeal, 39. Coro. 35. Fitz. Coro. 68. [e] *But* Staundforde *seems to be of Opinion, That an Acquittal on an erroneous Appeal, is a good bar to an Indictment till it be reversed by Error.* S. P. C. 106. Lett. B. *cited in* Crompt. Just. 112. pl. 15. *But this seems repugnant to all other Books, and to what is said by* Staundforde *himself, in the very same page. Indeed in the second Addition of* Hale's *Pleas of the Crown, there is a Note to the same Effect with what is said in* Staundforde; *but this is manifestly misprinted, and the Word* Acquit *put for* Attaint. 5. 2. pl 7. Crompt. Just. 112. pl. 15. [f] Crompt. Just. 111. pl. 4, 5. Supra ch. 9. Sect. 15, 16. 4 Co. 46. [g] Fitz. Coro. 444. 9 H. 41. Crompt. Just. 112. pl. 14. S. P. C. 106. Lett. B. H. P. C. 245. [h] Supra ch. 27. Sect. 107. [i] 20 H. 7. 11. b. 12. a. 21 H. 6. 28 b. 29. a. *Abridged* Bro Appeal, 36, 37, 38. 11 H. 41. 41 Ass. pl. 9. 1 Sid. 179. [k] Supra ch. 23. Sect. 41. Crompt. Just. 112. pl. 14. S. P. C. 106. Lett. B. H. P. C. 245. [l] Supra, ch. 23. Sect. 39, 40, 41, 42. [m] 9 Ass. pl. 15. [n] 4 Co. 45. b. Rast. Ent. 385. pl. 4. pl. 6. *Abridged* Fitz. monstrans de faits, 128. 25 E. 3. 44. pl. 16. *Abridged* Fitz. Coro. 136. *Abridged* Bro. Coro. 120 *or* 121. Crompt. Just. 112. pl. 8. Fitz. Coro. 229. [o] 1 Lev. 118. Supra, ch. 25. Sect. 39, 40. Supra Sect. 1, 8, 9.

[a] Chapter of *Indictments*, That if an Approver be vanquished in Battel joined on his Appeal, he shall be hanged, and the Appellee discharged, without being arraigned at the Suit of the King. Also it hath been [b] adjudged, That upon such a Vanquishment the Appellee is intitled to his Damages against the Appellant, as being *legitimo modo acquietatus*, which seems [c] necessarily to imply that he is finally acquitted as well against the King as against the Party.

Sect. 8. As to the fourth Particular, *viz.* How far it is necessary that the Indictment or Appeal in the Record of Acquittal be free from Error, and well commenced: I take it to be settled [d] at this [e] Day, That where-ever the Indictment, or Appeal, whereon a Man is acquitted, is so far erroneous (either for want of Substance in setting out the Crime, or of Authority in the [f] Judge before whom it was taken,) that no good Judgment could have been given upon it against the Defendant, the Acquittal can be no Bar of a subsequent Indictment or Appeal, because in Judgment of Law the Defendant was never in danger of his Life from the first; for the Law will presume *prima facie* that the Judges would not have given a Judgment, which would have been liable to have been reversed. But if there be no Error in the Indictment or Appeal, but [g] only in the Process, it seems agreed, That the Acquittal will be a good Bar of a subsequent Prosecution, notwithstanding such Error; the best Reason whereof seems to be this, That such Error is [h] salved by the Appearance.

Sect. 9. It seems agreed, [i] That an Acquittal on an Appeal brought by one who had no Right to bring it, as by any other Woman [k] except the Wife of the Deceased, or by any other Man [l] except the next Heir, is no more a Bar to an Appeal by another Appellant, or to an Indictment, then an Acquittal on an insufficient Appeal or Indictment would have been.

Sect. 10. As to the fifth Particular, *viz.* Whether an Acquittal in any Court which has a Jurisdiction be sufficient for this Purpose: Notwithstanding the [m] Opinion in the Book of *Assizes*, That no Acquittal in any other Court can be any Bar to a Prosecution in the Court of King's Bench, because that is the highest Court, I take it to be settled [n] at this Day, That an Acquittal in any Court whatsoever, which has a Jurisdiction of the Cause, is as good a Bar of any subsequent Prosecution for the same Crime, as an Acquittal in the highest Court. And therefore it hath been adjudged, [o] That an Acquittal of Murder at a Grand Sessions in *Wales*, may be pleaded to an Indictment for the same Murder in *England*. For the [p] Rule is, That a Man's Life shall not be brought into Danger for the same Offence more than once.

Sect. 11. As to the ſixth Particular, *viz.* How far an Acquittal of a Perſon as Principal will bar a ſubſequent Proſecution againſt him as Acceſſary; *& è converſo*, how far an Acquittal of a Man as Acceſſary will bar a Proſecution againſt him as Principal: It ſeems to be [a] ſettled at this [b] Day, That an Acquittal of a Man as Principal is no Bar of a ſubſequent Proſecution againſt him as Acceſſary after the Fact, becauſe ſuch Acquittal clears him only of the Charge of having committed the Fact, which being a Crime entirely different from that of receiving him that hath committed it, there ſeems no more Reaſon that the Acquittal of it ſhould bar a Proſecution for the Receipt, than if they were Offences that bore no Manner of Relation to one another. But it is [c] holden in many Books of good Authority, (contrary to what is admitted [d] to have been the ancient Law,) that the Acquittal of a Man as Principal is a good Bar of a ſubſequent Proſecution againſt him as Acceſſary before; for it is ſaid, That ſuch an Acceſſary is in ſome meaſure [e] guilty of the Fact, and therefore that an Acquittal which clears a Man from being guilty of the Fact, doth by Conſequence clear him from being ſuch an Acceſſary. And this ſeems reaſonable upon the Suppoſition that a Man may be found guilty of an Indictment againſt him as Principal, upon Evidence which only proves him to have been an Acceſſary before. But if a Man cannot be found guilty of ſuch an Indictment upon ſuch Evidence, as it is ſtrongly [f] holden that he cannot, it may with great Reaſon be ſaid, That the Acquittal of him as Principal no way acquits him as Acceſſary before; for if ſo, he might ſave himſelf by a mere Slip in the Indictment, and bar all other Proſecutions by an Acquittal on a Trial, which in truth never brought him into [g] Danger of his Life. And it is upon this Suppoſition, as I ſuppoſe, That it is holden in ſome [h] Books, contrary to thoſe above-cited, That one who has been acquitted as Principal may be tried again as Acceſſary before, as well as after.

Sect. 12. But it ſeems [i] agreed, That an Acquittal of a Man as Acceſſary before, or after, is no Bar to a ſubſequent Proſecution againſt him as Principal.

Sect. 13. Alſo it hath been holden, That an Acquittal of a Man as Acceſſary to one Principal, will not ſave him from being arraigned afterwards as Acceſſary to another in the ſame Fact; but for this I ſhall refer to *Chap.* 29. *Sect.* 46.

Sect. 14. As to the ſeventh Particular, *viz.* How far the Law is altered in theſe Reſpects as to an Indictment by 3 *H.* 7. 1. It ſeems agreed, [k] That by the Common Law an Acquittal on an Indictment might be pleaded in Bar of an Appeal of Death, in the ſame Manner as an Acquittal of any other Felony might be pleaded in Bar of a ſubſequent Proſecution, and therefore in favour of Appeals a general Practice was introduced, [l] not to try any Perſon on an Indictment of Death, till after

[a] Kely. 25, 26. H. P. C. 244. S. P. C 105. Lett. A. Crompt. Juſt. 42. pl. 18. 112. pl. 7. 27 Aſſ. pl 10. *Abridged* Fitz. Coro. 200. Bro. Coro. 105. Lamb. B. 2. ch 7.

[b] Cont. Fitz. Coro. 282.

[c] S. P. C. 44. Lett. C. 105. Lett. A. B. Kely. 25, 26. Lamb. B. 2. ch. 7. H. P. C. 224. 244. Crompt. Juſt. 42. pl. 18. 112 pl. 7. *But the Principal Authority in the old Books is* 2 E. 3. 20. pl. 14. *Abridged* Fitz. Coro. 150. *which ſeems inconſiſtent with itſelf; for the Words are for an example, That a Man may in ſuch Caſe be twice put to anſwer, We award that you go quit. And* Fitz. Coro. 282. *is contradicted by all other Books; for it ſays, That a Man acquitted as Principal, cannot be ſo much as arraigned as an Acceſſary after. And* 27 Aſſ pl. 10. 8 H. 5. 6. pl. *Principal, upon* ſupra ch. 29.

Abridged Bro. Coro. 105. *and* Fitz Coro. 200. *extend only to the Caſe of an Acceſſary after. And* 26. *Abridged* Fitz. Coro. 463. *expreſsly goes upon the Suppoſition, That a Man may be found guilty as on Evidence which only proves him Acceſſary.* [d] S P. C. 105. Lett. B. Fitz. Coro. 424. [e] Vide Sect. 13, 14. [f] H. P. C. 266. Keilw. 107. Dalif. 14. [g] Vide ſupra Sections 1, 8, 9, 10. [h] Kielw. 107. Dalif. 14. Lamb. B. 2. ch. 7. [i] Crompton's Juſtice, 43. pl. 30. Bro. Coro. 186. [k] Vide ſupra, ch. 25. Sect. 15. 21 H. 6. 28, 29. *Abridged* Bro. Appeal, 41. 44 E. 3. 25. pl. 36. *Abridged* Bro. App. 12. H. P. C. 244, 245. 47 E. 3. 16 pl. 27. *Abridged* Fitz. Coro. 104. Bro. Appeal 33, 55, 102. 2 Leon. 161. *But this is made a Quære* 17 Aſſ. pl. 1. [l] Vide ſupra, ch. 25. Sect. 15. Crompt. Juſtice, 111. pl. 2, 3. Kely. 95, 96, 97, 98. 2 Leon. 161. H P. C. 244, 245. S. P. C 107. Lett. A. Bro. Appeal, 9. 32 Aſſ. pl. 8. *Abridged* Bro. Appeal. 119. 45 E. 3. 25. pl. 36. *Abridged* Bro. Appeal 12. 11 H. 4, 94. pl. 56. *Abridged* Bro. Appeal 36. 41 Aſſ. pl. 14. *Abridged* Bro. Appeal. 75.

the Year and Day had been paſſed, by which Time it often happened that all was forgotten; and *for Reformation thereof it is enacted, That if any Man be ſlain or murdered, and therefore the Slayers, Murderers, Abettors, Maintainers and Comforters of the ſame, be indicted, that the ſame Slayers and Murderers, and all other Acceſſaries of the ſame, be arraigned and determined of the ſame Felony and Murder at any Time at the King's Suit, within the Year after the ſame Felony or Murder done, and not tarry the Year and Day for any Appeal to be taken for the ſame Felony or Murder. And if it happen any Perſon named as Principal or Acceſſary to be acquitted of any ſuch Murder at the King's Suit, within the Year and Day, that then the ſame Juſtices before whom he is acquitted, ſhall not ſuffer him to go at large, but* [a] *either to remit him again to the Priſon, or elſe to let him to Bail after their Diſcretion till that Year and Day be paſſed. And if it fortune the ſame Felons or Murderers, and Acceſſaries ſo arraigned, or any of them to be acquit, or the Principal of the ſaid Felony, or any of them to be attainted, the Wife or next Heir to him ſo ſlain, as ſhall require, may have their Appeal of the ſame Death and Murder, within the Year and Day after the ſame Felony and Murder done againſt the ſaid Perſons ſo arraigned and acquit, and all other their Acceſſaries, or againſt the Acceſſaries of the ſaid Principal, or any of them, ſo attainted, or againſt the ſaid Principals ſo attainted, if they be on live, and the Benefit of the Clergy thereof before not had; and that the Appellant ſhall have ſuch and like Advantage, as if the ſaid Acquittal or Attainder had not been, the ſaid Acquittal or Attainder notwithſtanding.*

[a] Vide ſupra, ch. 33. S. 121. F. N. B. 251. Lett. G. Crompt Juſt. 111. pl. 2. 3.

[b] *This ſeems miſprinted in* Keble's *Statutes*, Vide S. P. C. 107. *and* Raſt. *Statutes title* Murder, 2

Sect. 15. It ſeems [c] agreed, That this Statute ſhall not be conſtrued to extend to any other Appeal but of Death, nor to any other Acquittal but upon an Indictment; from whence it follows, That an Acquittal on an Indictment, or Appeal, for any other [d] Felony except Death, may ſtill be pleaded in Bar of an Appeal for the ſame Crime, and that an Acquittal on an Appeal of Death [e] may ſtill be pleaded in Bar of an Indictment, in the ſame Manner as by the Common Law.

[c] H. P. C. 244, 245. S. P. C. 107. Lett. A.

[d] H. P. C. 244, 245. S. P. C. 107, Lett. A

[e] H. P. C. 244, 245. S. P. C. 107. Lett. A

Sect. 16. How far a Perſon found guilty of Manſlaughter, or of Homicide *ſe defendendo*, on an Indictment of Murder, is liable to be tried again upon an Appeal by force of this Statute, ſhall be conſidered in the next Chapter.

Crompton's Juſtice, 111, pl. 2, 3.

CHAP.

CHAP. XXXVI.

Of the Plea of Autrefoits attaint *or* convict.

Sect. 1. IT ſeems to be generally agreed, [a] That where-ever a Man is attainted of Felony, either by Judgment upon a Verdict, or by [b] Outlawry, or Abjuration, whether upon an Indictment or Appeal, he may plead ſuch Attainder to any ſubſequent Indictment or Appeal, for the ſame or any other Felony. And two Reaſons are given for ſuch Plea to a ſecond Proſecution for the ſame Felony; Firſt, [c] Becauſe the Life of the Defendant was in danger by the firſt; and it is againſt a Maxim of Law to bring a Man into ſuch Danger more than once for one and the ſome Offence: 2dly, [d] Becauſe generally the proceeding in ſuch ſecond Proſecution cannot be to any Purpoſe, becauſe the Party is dead in Law by the firſt Attainder, and hath forfeited all that he can forfeit, and therefore it is ſaid, That it is equally abſurd to attaint him a [e] ſecond Time, as to attempt to kill one who is already dead. And this is the only [f] Reaſon I find any where given for the Plea of *Autrefoits attaint* of one Felony to a Proſecution for another. But where both of theſe Reaſons fail in the firſt Caſe, and the latter of them in the ſecond; and alſo in ſome other Caſes, for ſpecial Reaſons, the Plea of *Autrefoits attaint* ſeems to be of little Effect, as in the following Inſtances.

Sect. 2. *Firſt*, Where the firſt Attainder is reverſed for Error, after which it can neither be pleaded to a Proſecution for the ſame or any other Felony; becauſe by ſuch Reverſal the Attainder is of no [g] more Force than if it had never been: And if an Acquittal on an erroneous Indictment or Appeal will not bar a ſubſequent Proſecution, ſurely *a fortiori* an Attainder reverſed will not do it. But it is agreed to be a good Bar while it ſtands unreverſed, becauſe it is not void but voidable only.

Sect. 3. *Secondly*, Where the Attainder was at the Suit of the King and [h] pardoned, and after the Party is proſecuted upon an Appeal; for it is an allowed Maxim, That the King cannot bar the Suit of the Subject, and if he cannot bar an Appeal by pardoning the Offender before it appear whether he be guilty or innocent, there cannot but be much leſs Reaſon that he ſhould bar it after the Guilt appears by a Judgment upon Record.

[a] H. P. C. 247. S. P. C. 107. Lett. B. 12 Co. 100. 6 Co. 13. b. 3 Inſt. 213, 214. Supra, ch. 23. Sect. 38.

[b] *Yet this is made a Quære* 28 E. 3. 90. pl. 3. *but no Notice is taken of the Quære in the Abridgment of the Caſe in* Fitz. Coro. 136. Vide 18 H. 8. 2. pl. 12. 12 Co. 100.

[c] 9 H. 7. 19. pl. 14. *Abridged* Bro. Appeal. 89. Coro. 11.

[d] S. P. C. 107. Lett. B. H. P. C. 247. 12 Co. 100. Cro. El. 516. Cromp. 113. pl. 1.

[e] Bro. App. 9. 44 E. 3. 44. pl. 57. *Abridged* Fitz. Coro. 95. 6 H. 4. 6. pl. 29. *Abridged* Fitz. Coro. 227. Bro. Appeal, 10. Popham, 107.

[f] H. 4. 31. pl. 16. Fitz. Eſcheat, 14. Bro. Coro. 11. Fitz. Coro. 81. 95. Cont. 4 E. 4. 11. pl. 18. Fitz Coro. 27. *See the Chapter of* Judgment.

[g] *See the Books cited to the precedent Letter.*

[h] S. P. C. 106. Bro. Coro. 11. 28 E. 3. 90. pl. 3. Letter B. 12 Co. 100. H. P. C. 247. 4 Co. 45. a. *Abridged* Fitz. Coro. 139. S. P. C. 107. Lett. B. 3 Inſt. 213. Crompton's Juſtice, 113. pl. 3. 6 H. 4. 6. pl. 29. *Abridged* Fitz. Coro. 227. Bro. Appeal. 10. Cont. 12 Co. 100.

Sect. 4. *Thirdly*, Where a Perſon attainted of Felony, is afterwards indicted of High Treaſon, whether before or after his * Attainder; for the Judgment of Death in High Treaſon is not only different from that in Felony, but the Forfeiture is alſo more general, (extending to Land in Tail as well as to Land in Fee-ſimple, ſince [a] the Statutes of 26 *H.* 8. 13. and 33 *H.* 8. 20.) But if the Felony were firſt committed, it ſeems [b] agreed, That the Title of Eſcheat to the Felons Lands in Fee-ſimple, veſted in the Lords of whom they are holden from the Time of the Felony, ſhall not be deveſted by the ſubſequent Attainder for the Treaſon, as it would be if the Treaſon had been firſt committed.

* 1 H. 6. 5. 22. *Abridged* Bro. Treaſon, 11. Fitz Coro. 2. 3 Inſt. 213. Popham, 107. H. P. C. 213, 241. *And the Obſervation to the contrary in* 2 Inſt. 590. *and* S. P. C. 107. Lett. B. Crompt. Juſt. 113. pl. 2. *on the above-cited Year Book of* H. 6. 5. *to the plain purport of it, ſeems repugnant.*

[a] Co. Lit. 372, 392. *See the Chapter of Forfeiture.*

[b] 3 Inſt. 213. S. P. C. 137. Lett. B.

Sect. 5. *Fourthly*, Where an Appellee of Larceny hath a ſecond Appeal brought againſt him hanging the firſt, and afterwards is attainted in the firſt, in which Caſe, according to ſome [c] Opinions the Court may, in order to entitle the ſecond Appellant to a Reſtitution, enquire by an Inqueſt of Office, and according to other [d] by an Inqueſt taken at the Miſe of the Parties, whether ſuch Appellee be guilty of the Larceny or not. And the Law ſeems to be the ſame in Relation to an Indictment of [e] Larceny ſince the Statute of 21 *H.* 8. 11. which entitles the Proſecutor to a Reſtitution of his Goods, upon the Offender's being found guilty, *&c.* in the ſame Manner as upon an Appeal. Alſo it hath been [f] adjudged, That a Perſon attainted is as liable to anſwer a Perſonal Action, as if he had not been attainted. For otherwiſe his Attainder would give him a Privilege and Protection, which the Law is far from intending in allowing the Plea of *Autrefoits attaint* to a ſecond Proſecution for a new Crime, which is chiefly grounded on this Reaſon, That the Law will not ſuffer an abſurd and vain Thing in attainting one who is attainted already.

[c] Vide ſupra ch. 23. Sect. 53. *and* ch. 28. Sect. 7. Fitz. Coro. 379. 7 H. 4. 31. pl. 16. *Abridged* Fitz. Coro. 81. Bro Appeal, 21. Vide 44 E. 3. 44 pl. 57. *Abridged* Bro. Appeal, 11. Fitz. Coro. 95.

[d] 4 E. 4. 11. pl. 18. S. P. C. 66. Lett. E. H. P. C. 212. 248. Bro. Appeal, 93. Fitz. Coro. 26 Vide 6 Ed 4. 4. *Abridged* Bro. Coro. 147.

Sect. 6. *Fifthly*, Where a Perſon attainted of one Felony, is afterwards proſecuted as a Principal in another, and others are alſo proſecuted together with him as his Acceſſaries, in which Caſe it is ſaid, [g] That for the Benefit of Publick Juſtice he is compellable to plead, *&c.* to the ſecond Proſecution in the ſame Manner as if he had not been attainted, becauſe otherwiſe the Acceſſaries to ſuch ſecond Felonies could not [h] be brought to their Trials for want of a Conviction of their Principal.

Sect. 7. It ſeems [i] clear, That a Judgment againſt a Man on an Indictment or Action of Treſpaſs, is no Bar to an Indictment or Appeal of Larceny, for the ſame taking, becauſe Treſpaſs and Larceny are Offences of a different Nature, and the Judgment for the one entirely differs from that for the other. Alſo I take it to be in a great meaſure [k] agreed, That the Judgment of *Pain fort & dure* in one Felony is no Bar to a Proſecution for another; becauſe ſuch Judgment neither corrupts the Blood, nor forfeits the Lands, as an Attainder doth. But it ſeems queſtionable, whether it may not bar a ſecond Proſecution for the ſame Felony, becauſe the Life of the Party was brought into danger by the firſt.

[e] Vide ſupra, ch. 23. Sect. 55, 56. H. P. C. 212, 248.

[f] 3 Inſt. 213, 215. Cro. El. 516. Cont. Cro. El. 213. [g] Poph. 107. [h] Vide ſupra, Ch. 29. *from* Sect. 36 *to* Sect. 45. [i] Vide ſupra, ch. 35. Sect. 5. 7 H. 4. 35. pl. 4. Fitz. Coro. 82. [k] 3 Inſt. 213. Crompt. Juſt. 113. pl. 4. Dy. 308. pl. 73. [l] S. P. C. 31, 32.

Sect. 8. It is [l] ſaid, That *Autrefoits attaint* or *convict* was no Plea for one who had broken the Priſon of the Ordinary; but for this I ſhall refer to the Books cited, *Ch.* 33. *Sect.* 9, 10.

Sect. 9. It is certain that an Attainder on an Indictment of Death is no Bar to an Appeal, by Reaſon of 3 *H.* 7. 1. ſet forth more at large in the precedent Chapter, which gives an Appeal againſt Perſons attainted of Death, the Benefit of Clergy thereof being not had, as it is certain that it cannot at this Day. But it ſeems [m] agreed, That in all other Caſes the Plea of *Autrefoits attaint* is ſtill of the ſame Force as it was by the Common Law.

[m] H. P. C. 247.

Sect. 10. The Plea of *Autrefoits convict*, ſeems chiefly to depend on this Reaſon [a] That the Party ought [b] not to be brought twice into Danger of his Life for the ſame Crime. Upon which Ground it ſeems [c] agreed, That a Conviction on an Appeal or Indictment of Burglary, or other Felony, may be pleaded to an Indictment or Appeal for the ſame Felony; And that a Conviction of Manſlaughter in an Appeal of Death may be pleaded in Bar of a ſubſequent Indictment or Appeal of the ſame Death; and that the Reaſon why ſuch a Conviction on an Indictment of Death cannot be pleaded to an Appeal as well as to an Indictment (unleſs the Perſon ſo convicted be admitted to his Clergy, or at leaſt have prayed it) [d] depends entirely on 3 *H.* 7. 1. which expreſsly giving an Appeal againſt a Perſon attainted on an Indictment of Death, who hath not had his Clergy, cannot but be thought to give it as well againſt a Perſon convicted, ſince every Attainder includes a Conviction and more, and it is wholly owing to the Default of the Court which ſhall not prejudice any one, that a Perſon convicted is not attainted [e]. But I do not find any Authority that a Conviction of one Felony may be pleaded in Bar of another; but on the contrary it is plain, That it was anciently the uſual [f] Practice, where a Clerk was indicted of ſeveral Felonies, and tried and convicted of one of them, and demanded by the Ordinary, not to deliver him upon ſuch Demand, but to detain him in Priſon till he had been arraigned of all the Felonies whereof he ſtood indicted. Alſo it ſeems [g] agreed, That even after the Statute of 25 *E.* 3. 5. *de clero*, a Clerk convict of one Felony, might immediately, while he ſtood at the Bar, be arraigned of any other.

[a] Vide ſupra, Sect. 1.
[b] Vide 4 Co. 39 b. 40. a. 47. a. 2 Leon. 83.
[c] 4 Co. 39. b. 40. a. 2 Leon. 83. Crompt. Juſt. 113. pl. 5. Kely. 94, 98. 4 Co. 46. 1 Salk. 62, 63. Cro Ca. 147.
[d] Vide 1 And. 68. 4 C. 46. 3 Mod. 156, 157. Infra, Sect 17.
[e] Vide S. P. C. 108. Lett. A. H P. C. 247, 248. Crompt. Juſt. 113.
[f] Fitz. Coro. 394, 461. S. P. C. 108. Lett. A. Supra, ch. 33. Sect. 117.

Sect. 11. But it ſeems to be admitted [h] as a general Rule, That after a Clerk convict was once delivered to the Ordinary, he could not afterwards be impeached either for the ſame, or any other Felony committed before ſuch Delivery to the Ordinary, whether it were within the Benefit of the Clergy or not: And tho' this be ſo far remedied [i] by 8 *Eliz.* 4. and 18 *Eliz.* 7. That a Perſon admitted to his Clergy, for any Felony, ſhall not in Reſpect thereof bar a ſubſequent Proſecution for another Felony not within the Benefit of the Clergy; yet, as I take it, the Law generally ſtill continues as it was, as to the Felony whereof the Party who is admitted to his Clergy is convicted, and alſo as to other Felonies within the Benefit of the Clergy committed before ſuch Admittance, whereof it ſeems agreed, That regularly one admitted to his Clergy ſhall not be afterwards arraigned.

See the Preamble of 25 E. 3, 5.
[g] S P. C. 108. Lett. A
[h] Dy. 214, 215. H. P. C. 248, 249. Supra, ch. 33. Sect. 117 *to* 121. 18 H. 8. 2. pl. 12. 3 Inſt. 131. Kely. 93, 103. Crompt. Juſt. 113 pl. 8, 9, 10. Fitz. Coro. 232.

Sect. 12. It ſeems to have been long ſettled, That not only he who hath been admitted [k] to his Clergy on a Conviction of Manſlaughter, upon an Indictment of Murder, but alſo that he who being called to Judgment on ſuch a Conviction, hath [l] prayed his Clergy, but hath not

[i] Vide ſupra, ch. 33. *from* Sect. 221. *to* Sect. 130.
[k] 4 Co. 40. Wetherel's *Caſe*. 45. b. 46. Crompt. Juſt. 102, pl. 19. Vide Yelv. 204, 205. 1 Bulſt. 241. *See the Caſes cited to the next Letter.*
[l] 2 Leon. 160, 161. Cro. Ja. 282. 1 And. 68. 4 Co. 45. b. 46. a. Kely 93, &c. 3 Inſt. 161. Coke's Entr. 55. b. *This is left doubtful*, 2 Roll. Rep. 478.

been actually admitted to it, may bar any ſubſequent Appeal for the ſame Death, as he might by the Common Law. And as to the Objection from the ſeeming Abſurdity, that if the Law be ſo, he that hath his Clergy on a Conviction of Manſlaughter will be in a better Caſe than if he had been wholly acquitted, it may be anſwered, That this doth not depend on any Reaſoning from the Nature of the Thing, but from the Statute of 3 *H.* 7. 1. which expreſsly takes away the Plea of *Autrefoits acquit* in this Caſe, but by ſuffering even Perſons attainted on an Indictment of Death, who have been admitted to their Clergy to plead ſuch Admiſſion in Bar of an Appeal, plainly ſeems to have intended to leave the Benefit of the Clergy, as it ſtood before.

Sect. 13. Alſo it hath been adjudged, [a] That it is not material whether the Appeal, in Bar whereof ſuch Conviction and Clergy are pleaded, were depending at the Time of ſuch Conviction or not; ſince the Judges [b] may, if they think fit in their Diſcretion, proceed on an Indictment of Death, notwithſtanding an Appeal thereof be depending; and therefore as on the one Side the Party is liable to be hanged if found guilty of Murder on a Verdict againſt him on ſuch Indictment, pending an Appeal, it cannot but be equitable, that on the other Side he ſhould have the full Benefit of the Verdict if found in his Favour.

Sect. 14. But there have been many [c] Opinions, That unleſs the Court call a Man to Judgment on a Conviction of Manſlaughter on an Indictment of Murder, he cannot demand the Privilege of his Clergy, and conſequently cannot plead ſuch Conviction and Clergy thereon had, or prayed, in Bar of an Appeal. And accordingly it was ſolemnly reſolved * by all the Judges, except one, in the latter End of the Reign of King *James* the ſecond, That the Court might delay the calling a Convict to Judgment, to hinder him from praying his Clergy, (eſpecially if an Appeal be depending,) in order to make him liable to an Appeal. But the contrary ſeems [d] to be fully ſettled in the Caſe of *Armſtrong* and *Liſle*, wherein it was adjudged upon great Deliberation, That a Conviction of Manſlaughter on an Indictment of Murder, and the [e] Prayer of Clergy thereupon, may be pleaded in Bar of an Appeal of the ſame Death, whether ſuch Prayer were made upon the Party's being called to Judgment or not. For it ſeems to be [f] admitted, even by thoſe of the contrary Opinion, That the Delay of the Court in not admitting a Man to his Clergy who prays it when called to Judgment, ſhall no way prejudice him, but that he may bar an Appeal by pleading the Conviction and Prayer of Clergy as much as if he had been actually admitted to it. And why ſhould it be more reaſonable that the Delay of the Court in not calling a Man to Judgment, ſhould put it in the Power of the Court to make ſo high a Privilege in favour of Life, wholly precarious and diſcretionary? To which may be added, That a Demand of Clergy by a Convict before he is called to Judgment, ſeems in Strictneſs to be as legal as a Demand after a Call to Judgment; ſince whenever a Perſon appears to have a Right to his Clergy, as he ſeems plainly to do, when his Crime is found to be ſuch as is within the Benefit of it, it ſeems a neceſſary Conſequence that he has a Right to pray it. And it ſeems [g] agreed, That by the ancient Common Law, Clergy might be demanded upon the Priſoner's firſt Arraignment. And tho' afterwards for ſpecial Reaſons, the Judges made it a Rule not to admit any one to it till after he had pleaded; yet I find it no where holden in the old

[a] Salk. 63. Kely. 91, 92, 94. 104, 107, 108. *But the contrary ſeems to be holden in* 3 Inſt. 131.

[b] Supra, ch. 25. Sect. 15. *and the Notes to* ch. 35. Sect. 14.

[c] Kely. 94, 95, 96, 97, 98. 1 Sid. 316. Kely. 106. Vide Dyer, 214. pl. 48. 215. pl. 49. 296. pl. 60. 3 Mod 156, 157, 158. Kely 106.

[d] Kely. 93, 103, 104, 105, 107. Salk. 62, 63.

[e] *But Note that in this Caſe the Party was actually admitted to his Clergy in the King's Bench.*

[f] Vide ſupra, Sect. 12. 1 And. 68. 4 Co. 45, 46. Kely. 105. Salk. 63.

[g] Supra, ch. 33. Sect. 110, 111.

Books, That a Man could not legally demand it till called to Judgment. Neither doth the [a] Opinion to the contrary, in the Report of the Case of *Armstrong* and *Lisle*, grounded upon the Authority of [b] *Searl*'s Case, seem to be all made out by that Case.

[a] 1 Salk. 63. Kely. 105.
[b] Hob. 289.

Sect. 15. But it seems clearly settled, That whenever the Record on which a Man is convicted of Manslaughter, and admitted to his Clergy, on an Indictment or Appeal of Murder, is erroneous, either in Respect of Insufficiency [c] in the Indictment or Appeal, or for a [d] Mis-trial, *&c.* so that his Life was not in Danger at the Trial, *&c.* he cannot plead such Conviction and Clergy thereon had, in Bar of a second Indictment or Appeal.

[c] 4 Co. 39, b. 40. a. 47. a. Crompt. Just. 111. pl. 4, 5.
[d] 6 Co. 14 b.

Sect. 16. It hath been adjudged, [e] That the Conclusion of a Plea of *Autrefoits convict* of Manslaughter, and Clergy thereon, *&c.* may be either *petit judicium si prædict' A. B. iterum de eadem morte, de qua semel convictus est, respondere compelli debeat*, or thus, [f] *petit judicium si prædict' A. B. appellum suum prædict. versus eum de morte prædict. habere seu manutenere debeat.*

[e] 3 Inst. 131.
[f] Coke's Entr. 55. b. 3 Inst. 131.

Sect. 17. It is said [g] to have been adjudged in *Holcroft*'s Case, That a Verdict finding a Man guilty of Homicide *se defendendo* on an Indictment of Murder may be pleaded to an Appeal of the same Death; but this was certainly not the very Point [h] in Question in that Case; neither do I find it expressly taken Notice of in any Report of it. However, since it seems clear, That such a Conviction wou'd be a good Bar of an Appeal at the Common [i] Law; and since it is not within the Letter of 3 *H.* 7. 1. which mentions only Persons acquitted or attainted, it shall not easily be construed to be within the Meaning of it, [k] being in this Respect a penal Statute, and derogatory from a Maxim of the Common Law in favour of Life. And tho' it be in a great measure [l] agreed, That the Statute in giving an Appeal against a Person attainted of Murder doth by necessary Consequence give it as well against one convict of Murder, because every Person attainted is convict and more; and if an Appeal shou'd not lie against a Person convicted until he were attainted, it wou'd be wholly in the Power of the Court by delaying to give Judgment on a Person convicted to bar an Appeal. Yet since these Reasons hold not in the Case of one convict of *Homicide se defendendo* only, it may well be argued, That a Conviction thereof may still be a good Bar of an Appeal.

[g] Crompt. Just. 111. pl. 6.
[h] Coke's Ent. 55. 4 Co. 45. b. 46. 3 Leon. 160, 161. 3 Inst. 131. 1 And. 68.
[i] Vide supr. Sect. 10.
[k] Vide 3 Inst. 131. Kely. 104.
[l] 1 And. 68. 4 Co. 46. Supra, Sect. 10.

CHAP.

CHAP. XXXVII.

Of Pardon.

BEFORE I proceed to conſider in what Manner a Pardon is to be taken advantage of, it may not be improper to premiſe ſome Things concerning the Nature of Pardon in general, as,

1. By whom it is grantable.
2. Where it is grantable of Right.
3. What is the Nature of a Pardon of Grace.

Sect. 1. As to the firſt Point, *viz.* By whom a Pardon is grantable: It ſeems that anciently the Right of pardoning Offences within certain Diſtricts was claimed by the Lords Marchers and others, who had *Jura regalia*, by ancient Grants [a] from the Crown, or by Preſcription; but it is enacted by 27 *H.* 8. 24. *Par.* 1. *That no Perſon or Perſons, of what Eſtate or Degree ſoever they be, ſhall have Power to pardon or remit any Treaſons or Felonies whatſoever, nor any Acceſſaries to the ſame, nor any Outlawries for ſuch Offences, whether committed in* England *or* Wales, *or the Marches of the ſame; but that the King ſhall have the whole and ſole Power and Authority thereof united and knit to the Imperial Crown of this Realm, as of good Right and Equity it appertaineth.*

[a] *See the Statute of* 27 H. 8. ch. 24. Co. Litt. 114. b. Crompt. Juſt. 116. pl. 19. S. P. C. 104. Lett. C. 3 Inſt. 233.

As to the ſecond Point, *viz.* Where a Pardon is grantable of Right, I ſhall endeavour to ſhew where it is to be ſo granted,

1. To Perſons found guilty of excuſable Homicide.
2. To an Approver who hath convicted an Appellee.
3. To Robbers, Clippers, Burglars, *&c.* who ſhall diſcover two or more guilty of Robbery, *&c.*

Sect. 2. And firſt, As to Perſons found guilty of excuſable Homicide, it is enacted by the Statute of *Gloceſter*, 9. *That in caſe it be found by the Country, that a Perſon tried for the Death of a Man, did it in his Defence, or by Misfortune, then by the Report* [b] *of the Juſtices to the King, the King ſhall take him to his Grace, if it pleaſe him.* By which at firſt Sight it ſeems to be implied, That it is left to the Diſcretion of the King, whether he will grant a Pardon in ſuch Caſe or not. And agreeably hereto it is ſaid in four ſeveral Notes [c] in *Fitzherbert's Abridgment* of Caſes in the Time of *Edward* 3. That a Perſon found guilty of Homicide *ſe defendendo* is to be remitted to Priſon in order to attend the King's Grace: And yet in two other Notes of [d] Caſes in the very ſame Year, it is ſaid,

[b] *For the Form of a* Certiorari *in ſuch Caſe, and a Pardon thereon.* See *Reg.* 109.

[c] Fitz. Coro. 284, 286, 287, 354. *Alſo* Fitz. Coro. 305. *and* 44 Ed. 3. 44. pl. 55. *Abridged* Fitz. Coro. 94. *and* 2 H. 4. 18 pl. 5. *Abridged* Bro. Forfeiture 9 *are to the ſame Purpoſe.*

[d] Fitz. Cor. 297, 361.

That

That in such a Case if the Prisoner cause the Record to come into the Chancery, the Chancellor will make him a Charter of Pardon, without speaking to the King; and this seems to be [a] settled at this Day, and agreeable to the ancient [b] Common Law, which shall not without express Words be restrained by a Statute which seems to be made in Affirmance of it. And therefore those Words in the Statute, *If it shall please the King*, shall be taken as spoken only out of Reverence to him, and not as intended to make the Right of the Subject to such a Pardon precarious. And the Cases above-cited, which seem to be contrary, may be reconciled with the others, by intending them to mean only the Grant of the King's Pardon to a Person represented to him as guilty of Homicide *se defendendo* only, without any Certificate of the Verdict upon Record; for none of those Cases make any mention of such Certificate, as the others do; and if there be no such Certificate, it seems plain that the Grant of a Pardon is a meer matter of Favour. However it seems to have been always [c] agreed, That the Forfeiture of Goods by such Homicide may be saved by a Pardon, (which in this particular Case seems to purge the Offence *ab initio*). And it hath been [d] adjudged, That such a Pardon is as necessary for one who is indicted only of Homicide *se defendendo* and confesses it, as for one who is found guilty of Homicide *se Defendendo* on an Indictment of Murder. And if he were found guilty of having fled [e], *&c.* I question whether the Pardon will save the Forfeiture of the Goods by Reason of the Flight; for that is grounded not on the Homicide, but on the Contempt of the Law in not standing to it's Judgment.

[a] S. P. C. 15. Lett. C. 16. Lett. D. 2 Inst. 316, 317. H. P. C. 250. Book 1. ch. 29 Sect. 24. Bro. Chart. de Pardon, 65. Keilw. 108. pl. 27.

[b] Vide Kely. 122, 123. Bract. Lib. 3. cap. 17. Book 1. ch. 29. *from* Sect. 19 *to the end of the Chapter.*

[c] *See the Books cited to the other Parts of this Section, and* 4 H. 7. 2. pl. 3. *Abridged* Fitz. Coro. 61. Bro. Coro. 138 *or* 139. Forfeit. 51. 2 H. 4. 18. pl. 6. *Abridged* Fitz. Coro. 69. Bro. Forfeit. 9.

[d] Keilw. 53. pl. 8. 4 H. 7. 2. pl. 3. *Abridged* Fitz. Coro. 61.

[e] Vide Fitz. Coro. 286, 287, *and* infr. *in the Chapter of Falsifying Attainders.*

Sect. 3. Secondly, In what Manner an Approver who convicts the Appellee is intitled to a Pardon, hath been already shewn, *Ch.* 24. *Sect.* 27.

Sect. 4. Thirdly, As to Robbers, Clippers and Coiners, and Burglars, *&c.* who shall discover two or more guilty of Robbery, *&c.* it is enacted by 4 *&* 5 *W. & M.* 8. *That if any Person or Persons, being out of Prison, shall after the* 25*th Day of March,* 1691. *commit any Robbery, and afterwards discover two or more, who then had, or afterwards shall commit any Robbery, so as two or more of the Persons discovered shall be convicted of such Robbery, any such Discoverer shall himself have, and is hereby entitled to the gracious Pardon of their Majesties, their Heirs and Successors, for all Robberies which he or they shall have committed at any Time or Times before such Discovery made, which Pardon shall be likewise a good Bar to any Appeal brought for any such Robbery.*

Sect. 5. Also it is enacted by 6 *&* 7 *W.* 3. 17. *That if any Person or Persons, being out of Prison, shall after the first Day of May,* 1695. *be guilty of clipping, coining, counterfeiting, washing, filing, or otherwise diminishing the Coin of this Realm, and afterwards discover two or more who then had, or afterwards shall commit any of the said Crimes, so as two or more of the Persons discovered shall be convicted of the same, any such Discoverer shall himself have, and is hereby intitled to the gracious Pardon of his Majesty, his Heirs and Successors, for all such his Crimes, which he or they have committed at any Time or Times before such Discovery made.*

Sect. 6. Also it is enacted by 10 *&* 11 *W.* 3. 23. (which excludes [f] all Persons from their Clergy who shall by Night or Day, in any Shop, Warehouse, Coach-house or Stable, privately and feloniously steal any Goods, Wares or Merchandizes, being of the Value of 5 *s.* or more, altho' such Shop, *&c.* be not actually broken open, and altho' no Person be therein, or shall

[f] Vide supra, ch. 33. Sect. 64, 65.

aſſiſt, hire or command any Perſon to commit ſuch Offence,) *That if any Perſon or Perſons after the twentieth Day of* May 1699. *ſhall commit any Burglary, Houſe-breaking, or Felony in ſtealing of any Horſe or Horſes, or any Money, Wares or Goods, from whom the Benefit of the Clergy is by the ſaid Act taken away, and being out of Priſon, ſhall diſcover two or more, who then had or after ſhall commit any ſuch Burglary, Horſe ſtealing or Felony, as aforeſaid, and ſhall be convicted thereof, or cauſe to be diſcovered and apprehended two or more, who ſhall be convicted, as aforeſaid, every ſuch Diſcoverer ſhall have, and is hereby iutitled to his Majeſty's moſt gracious Pardon for the Burglaries, Houſe-breakings, Horſe-ſtealings or Felonies as aforeſaid, which he or ſhe or they ſhall have committed at any Time or Times before ſuch Diſcovery made; which Pardon ſhall be likewiſe a good Bar to any Appeal for any ſuch Burglary,* &c.

* Vide Ch. 33. *from* Sect. 85. to Sect. 106.

Sect. 7. And it is farther enacted by 5 *Annæ* 31. *That every Perſon who ſhall be guilty of Burglary, or of the* * *felonious breaking and entring any Houſe in the Day-time, and after ſhall diſcover two who ſhall have committed ſuch Burglary or Felony, ſo as they be convict,* &c. *ſhall have* 40 l. &c. *and be entitled to a Pardon of all Burglaries and Felonies, except Murder and Treaſon; which Pardon ſhall be a Bar to any Appeal,* &c.

As to the third Point, *viz.* What is the Nature of a Pardon of Grace, I ſhall conſider the following Particulars;

1. Where ſuch a Pardon is good in Law.
2. What is the Effect of it.
3. Whether it may be waived.

As to the firſt Point, *viz.* Where ſuch a Pardon is good in Law, I ſhall conſider,

1. What is required to make a good Pardon of Felony in general.
2. What is particularly required in a Pardon of Treaſon, Murder, or Rape.
3. How far the Pardon of one Man may diſcharge another.
4. How far it is neceſſary that the Pardon of ſeveral Perſons for Felony, be ſeveral.
5. Whether the King's Grant of a Protection, or of a Place of Truſt to a Traitor or Felon, carry with it an implied Pardon of his Crime.
6. What is required to make a good Pardon of Offences not capital.
7. Whether any Offence can be pardoned before it is committed.
8. Whether there be any Offence which cannot be pardoned after it is committed.
9. How far a Pardon may be of Force againſt the private Intereſt of the Subject.
10. Whether it may be conditional.
11. Where a Pardon is void in Reſpect of a wrong Recital.

Sect. 8. As to the firſt Particular, *viz.* What is required to make a good Pardon of Felony in general: It ſeems to be laid down as a general Rule in many Books, That where-ever it may be reaſonably intend-

ed that the King, when he granted such Pardon, was not fully [a] apprized both of the Heinousness of the Crime, and also how far the Party stands convicted thereof upon Record, the Pardon is void, as being gained by Imposition upon the King. And this is very agreeable to the Reason of the Law, which seems to have intrusted the King with this high Prerogative, upon a special Confidence that he will spare those only whose Case, could it have been foreseen, the Law it self may be presumed willing to have excepted out of its general Rules, which the Wit of Man cannot possibly make so perfect as to suit every particular Case. And upon this ground it hath been holden, [b] That if one be indicted by these Words, That he had slain a Man for having sued him in the King's Court, and the King make him a Charter of all Manner of Felonies; this Charter shall not be allowed, because it shall be intended that the King was not acquainted with the Heinousness of the Crime, but deceived in his Grant. Also where one outlawed in an Appeal of Felony prayed his Clergy, which was counterpleaded on the Account of Bigamy, *&c.* and afterwards purchased a Pardon, and sued a *Scire facias* against the Appellant, *&c.* it is [c] said, That the Pardon was not allowed, because it made no mention of the Bigamy. Also it seems agreed by all [d] the Books That if a Man be attainted of any Felony, whether by Abjuration, or Outlawry, or otherwise, and afterwards get a Pardon which doth not expressly mention the Attainder, the Pardon will not avail him; [e] because it shall be intended that the King had not Conusance of the Attainder, but was deceived in his Grant, which shall not grieve him when he has true Notice of the Matter. And upon the like Ground it hath been holden [f] That the Pardon of one who is convicted by Verdict of a Felony is not good, unless it recite the Indictment and Conviction. Also it hath been [g] questioned, whether the Pardon of one who is barely indicted of Felony be good, if it do not mention the Indictment. But this hath been [h] adjudged to be helped by the Words *sive indictatus sive non.*

Sect. 9. It hath been holden, That anciently [i] a Pardon of all Felonies, included all Treasons, as well as Felonies whatsoever, and might be pleaded to an Indictment for them: And it seems to be taken for granted, in many [k] Books, that a Pardon of all Felonies in general, without describing any one particular Felony, may even at this Day, if the Party be neither [l] attainted nor indicted, be pleaded in Bar of any Felony whatsoever, coming within the general Limitations of the Pardon, except Murder or Rape, and that the only [m] Reason why it cannot be also pleaded to Murder or Rape, is because the Statute of 13 *R.* 2. set forth more at large under the next Point, requires an express Mention of them. But I find this Point no [n] where solemnly debated; neither doth it seem easy to reconcile it with the general Rules concerning Pardons, agreed to be good in other Cases; for if a Felony cannot be well

[a] 8 H. 6. 20. a. *Abridged* Bro. Charter of Pardon, 19. 8 H. 6. 21. *Abridged* Bro. Patents, 15. 6 Co. 13. 3 Inst. 238.

[b] 8 H. 6. 20. a. *But Note, that* Brook *in abridging this Case in the Title of Charter of Pardon,* 19 *omits the Words, because he sued him in the King's Court.*

[c] Fitz. Charter, 16. S. P. C. 102. Lett. C. Crompt Just. 115. pl. 4. *from the Authority of the Year-Book of* 11 H. 4. 11. pl. 24. *and* 48. pl. 23. *where on the Debate of this Case it seems admitted that the Pardon was not good because it made no mention of the Bigamy, and yet it is said that upon the Non-appearance of any one to maintain the Appeal, the Pardon was afterwards allowed.* Ergo Quære.

[d] 8 H. 6. 21. *Abridged* Bro. Patents, 15. 9 Ed. 4. 28. pl. 41. *Abridged* Fitz. Charter, 23. Bro. Charter, 23. 6 Ed. 4. 4. a. b. 26. a. *Abridged* Bro. Charter, 25. 6 Co. 13. b. Fitz. Coro. 124. Crompt. Just. 115. pl. 1, 2. 3 Inst. 238. H. P. C. 251. S. P. C. 102. Lett. C. 123. Lett. A. Dalt. ch. 94. Kely. 28.

[e] *These are the very Words of* 8 H. 6. 21. *Abridged* Bro. Patent, 15.

[f] 1 Sid. 366. pl. 2. 430. pl. 18. 2 Keb. 363. pl. 11. 3 Keb. 694. pl. 24.

[g] 2 Jon. 56. 3 Keb. 30. pl. 55.

[h] 2 Jon. 56. 3 Keb. 30. pl. 55. 694. pl. 24. Crompt. Just. 115. pl. 11.

[i] 10 Ed. 4. 10. pl. 14. Co. Litt. 391. a. 3 Inst. 236. Vide 22 Ass. pl. 49. S. P. C. 2. Lett. E. 102. Lett. F. Fitz. Charter, 13. Dy. 124. pl. 39. March 214, *&c.*

[k] Keilw. 91. b. Bro. Coro. 147. Co. Lit. 391. a. S. P. C. 2. Lett. E. 102. Lett. F. 3 Inst. 236. 22 E. 4. 7. pl. 22. *See the Books cited to the other Parts of this Section.*

[l] 8 H. 6. 21. *Abridged* Bro. Patents, 15. Fitz. Coro. 24. 2 Keb. 574. pl. 92. 10 Ed. 4. 10. pl. 14. 36. H. 6. 25. a. b. 26. a. H. P. C. 251. 2 Jon. 56. 6 Ed. 4. 4. Bro. Chart. Pardon, 10.

[m] Keilw. 91. b. 9 Ed. 4. 26. b. Crompton's Justice, 115. pl. 12.

[n] Vide 2 Keb. 363. pl. 11. 415. pl. 45. 574. pl. 92.

[a] *See the precedent Section.*

well [a] pardoned where it may be reasonably intended that the King, when he granted the Pardon was not fully appriſed of the State of the the Caſe, much leſs doth it ſeem reaſonable that it ſhould be pardoned where it may be well intended that he was not appriſed of it at all. And if a Felony whereof a Perſon be attainted cannot be well pardoned, even tho' it appear that the King was informed of all the Circumſtances of the Fact, unleſs it alſo appear that he was informed of the Attainder, much leſs doth it ſeem reaſonable that a Felony ſhould be well pardoned where it doth not appear that he knew any Thing of it: For by this Means, where the King in Truth intends only to pardon one Felony, which may be very proper for his Mercy, he may by Conſequence pardon the greateſt Number of the moſt heinous Crimes, the leaſt of which, had he been appriſed of it, he would not have pardoned. And for theſe Reaſons, as I ſuppoſe, general Pardons are commonly made by Act of Parliament; and have been of late Years [b] very rarely granted by the Crown, without a particular Deſcription of the Offence intended to be pardoned, As to the [c] Precedents of ſuch general Pardons in *Raſtal's Entries*, it may be anſwered, That their Authority ſeems to be of leſs weight when compared with thoſe many Precedents of Pardons in the Regiſter, every [d] one of which particularly deſcribe the Offence which is pardoned, and even thoſe which relate to [e] Homicide by Lunaticks, or Infants, or in Self-Defence, *&c.* except only one which pardons Eſcapes, but expreſsly excepts all voluntary ones. And therefore where the Books ſpeak of Pardons of all Felonies in general as good, perhaps it may be reaſonable for the moſt Part to intend that they either ſpeak of a Pardon by Parliament, or that they ſuppoſe [f] that the particular Crime is mentioned in the Pardon, tho' they do not expreſs it.

[b] Vide 2 Keb. 575. pl. 92.

[c] Raſt. Ent. 455. pl. 1, 2, 3. 459. pl. 21.

[d] *Regiſter of Original Writs from fol.* 308 *to* 313.

[e] *Regiſter of Original Writs* 309.

[f] *See* Dyer 124. pl. 39. Vide 22 Aſſ. 47. *Abridged* Fitz. Chart. 14.

Sect. 10. It is enacted by 27 *E.* 3. 2. *That in every Charter of Pardon of Felony, which ſhall be granted at any Man's Suggeſtion, the ſaid Suggeſtion and the Name of him that makes it ſhall be compriſed; and if after the ſame Suggeſtion be found untrue, the Charter ſhall be diſallowed. And the Juſtices before whom ſuch Charters ſhall be alledged, ſhall enquire of the ſame* [g] *Suggeſtion, and if they find it untrue, ſhall diſallow the Charters ſo alledged.* And it is enacted by 5 *H.* 4 2. That if an Approver become a Felon again after a Pardon, he who procured the Pardon ſhall forfeit 100 *l.*

[g] Vide Raym. 13. 1 Sid. 41.

Sect. 11. It is certain that a general Pardon of Felonies extends not to Piracy, as hath been more fully ſhewn, *Book* I. *Ch.* 37. *Sect.* 6.

Sect. 12. It ſeems a ſettled Rule, That no Pardon of Felony ſhall be carried farther than the expreſs Purport of it; and therefore where a Man was attainted on an Appeal of Robbery, and the King reciting the Attainder pardoned the Execution, it is ſaid, [h] That becauſe the Pardon did not expreſsly mention the Felony, it was diſallowed. But it does not appear how it was pleaded, nor to what purpoſe it was attempted to be made uſe of, nor how far, or in what Reſpect it was diſallowed; and therefore tho' [i] ſome Books ſeem to hold generally on the Authority of this Caſe, that ſuch a Pardon is no way good, yet I do not well ſee how any more can be proved from it than this, That it ſhall neither amount to a Pardon of the Felony itſelf, nor of any other Conſequence of the Attainder beſides the Execution. But it ſeems difficult to give a Reaſon why it ſhould not well pardon the Execution, ſince the King doth not appear to have been any way deceived; and [k] it hath been clearly adjudged, that the King may if he think fit pardon the Execution, and no more,

[h] 8 H. 4. 21. Pl. 7. *Abridged* Fitz. Chart. 26. Bro. App 27. Charter de Pardon 13 Coro. 24. 6 Co. 13. b. S. P. C. 102. Lett. C.

[i] Crompt. Juſt. 115. pl. 3. H. P. C. 251.

[k] 6 H. 4. 6. pl. 20. *Abridged* Fitz. Coro. 227. *See the Chapter of* Execution *and* Reprieve. *State Trials, Vol.* 1 *f.* 261.

Sect. 13. It seems [a] agreed, That where a general Act of Pardon excepts some particular Kinds of Felony, such Exception extends as well to those whereof any Persons are attainted as to others; for if those whose Guilt appears not on Record are excepted, much greater Reason is there that those whose Guilt appears in so high a Manner should be excepted; and therefore being within the Letter of the Exception, they cannot but be intended to be within the Meaning of it also. Neither doth it follow, that because the Pardon of a Felony whereof a Person is attainted is not [b] good without mentioning the Attainder, therefore such a general Exception of all Felonies shall not extend to those whereon there hath been an Attainder; for the Case of such a Pardon depends on this special Reason, That the King ought to be fully appriſed of the Proceedings against the Party before he pardons him, as hath been more fully shewn, *Sect.* 8.

[a] 6 Co. 13. b. H. P. C. 251. 3 Inst. 238.

[b] Vide supra, Sect. 8, 9.

Sect. 14. As to the second Particular, *viz.* What is particularly required in a Pardon of Treason, Murder or Rape: I do not [c] find that the Common Law required any Thing particular in the Form of Pardons of such Crimes, which was not equally requisite in the Pardon of any Felony whatever. But it being enacted by the Statute of 2 *Ed.* 3. 2. which is confirmed by several [d] subsequent Statutes, *That Charters of Pardon of Manslaughters shall not be granted, but only where the King may do it by his Oath, that is to say, where a Man slayeth another in his own Defence, or by Misfortune.* And there being no Precedent in the Register [e] of a Pardon of any other Homicide, but such as is done either in Self-defence, or by Misadventure, or by Infants or Madmen; [f] some have gone so far as to hold that the King's Pardon of any other Homicide is not good, unless it be confirmed by Parliament, or at least have a *non obstante* of these Statutes. But this seems contrary not only to the general Tenour of the Books, which clearly [g] admit the King's Power to pardon any Homicide in general, but also to the express Purport of 13 *Rich.* 1. which by shewing in what Form the King shall make a Pardon of Murder, plainly allows that he has a Power to make it. Besides, the same Reasons hold as strongly against the King's Power to pardon Manslaughter as Murder, which yet I never knew disputed. However it seems reasonable that thus much at least be allowed to follow from the Arguments above-mentioned, that too great Caution cannot well be [h] taken in the Grant of Pardons of any Homicide, that there be some such favourable Circumstances in Extenuation of it, as may bring it some way within the Equity of the Cases in the Register, and those old Statutes.

[c] Vide supra Sect. 9. Moor, 752. pl. 1033. 3 Mod. 37, 38. Fitz. Chart. 13. Coro. 25. Keilw. 91.

[d] 4 Ed. 3. Ch. 13. 10 Ed. 3, 2. 14 E. 3. 14.

[e] Regist. 309.

[f] S. P. C. 101. Lett. A. 3 Inst. 236. Style, 375, 377. March 217. Bract. 133. a. Show. Rep. 283, 284. 1 Keb. 67. 1 Lev. 8.

[g] 11 H. 4. 11. pl. 24. *Abridged* Fitz. Chart. 16. 4 Ed. 4. 10 pl. 14. *Abridged* Fitz. Coro. 25. 9 H. 7. 5. pl. 1.

Sect. 15. It is recited by the Statute of 13 *Rich.* 2. 1. *That the Commons had grievously complained of the outragious Mischiefs which had happened to the Realm, for that Treasons, Murders, and Rapes had been commonly done, and the more because Charters of Pardon had been easily granted in such Cases, and that hereupon the Commons had requested the King that such Charters might not be granted, to which the King had answered, That he would save his Liberty and Regality, as his Progenitors had done*; and thereupon it is enacted, *That no Charter of Pardon shall from thenceforth be allowed before any Justice for Murder, or for the*

Abridged Fitz. Scire fac. 56. 9 H. 4. 1. pl. 2. *Abridged* Fitz. Scire fac. 63. 13 H. 4. 6. pl. 14. *Abridged* Fitz. Coro. 266. Dy. 34 pl. 20.

in all which Books it is clearly admitted, That an Outlawry in an Appeal of Death may be pardoned by the King so far as the publick Justice is concerned in it. See also, Show. Rep. 283, 284. 2 Jon. 56. Kely. 24, 25. 1 Sid. 366. pl. 2. Moore 752. pl. 1033. Raym. 13. 2 Keb. 363. pl. 11. 415. pl. 45. 574. pl. 92. 3 Keb. 30. pl. 55. 694. pl. 24. 3 Mod. 37.

[h] *See* Bracton, 133 a.

Death of a Man ſlain by Await, Aſſault, or Malice prepenſed, Treaſon, or Rape of a Woman, unleſs the ſame Murder, Death of a Man ſlain by Await, Aſſault or Malice prepenſed, Treaſon, or Rape of a Woman, be ſpecified in the ſame Charter. And if the Charter of the Death of a Man be alledged before any Juſtices, in which Charter it is not ſpecified, That he of whoſe Death any ſuch is arraigned, was murdered, or ſlain by Await, Aſſault, or Malice prepenſed, the ſame Juſtices ſhall enquire by a good Inqueſt, of the Viſne where the Dead was ſlain, if he were murdered or ſlain by Await, Aſſault or Malice prepenſed; and if they find that he was murdered, or ſlain by Await, Aſſault or Malice prepenſed, the Charter ſhall be diſallowd, and further it ſhall be done as the Law alloweth.

Sect. 16. Alſo the ſaid Statute required that the Name of him who ſued for ſuch a Charter ſhould be endorſed upon the Bill under a great Penalty, *&c.* But as to this, and all other Matters, except only what is contained in the precedent Section, it is repealed by 16 *Rich.* 2. 6.

Sect. 17. It ſo fully appears from the expreſs Words of 13 *Rich.* 2. That the King's Pardon of Murder, Rape, or Treaſon cannot be good, without a Clauſe of *non obſtante*, unleſs the Crime be ſpecified in the Pardon, that I do not [a] know that it hath ever been diſputed. But it hath been formerly often [b] adjudged, That a Murder might be well pardoned under the general Deſcription of a felonious Killing, if the Charter had the Clauſe of *non obſtante* of this Statute. Which Conſtruction ſeems in a great meaſure to evacuate ſo excellent a Law, by barely changing the Form of the Charter. But it ſeems difficult to give a good Reaſon why this Statute ſhould ſo eaſily be evaded, which was made for the Prevention of ſuch great Miſchief, and no way tends to aboliſh the King's Prerogative, but only to put ſuch a Reſtraint upon the Abuſe of it, which every one muſt own to be reaſonable. But if ſuch Opinions were founded on the King's Power of diſpenſing with Statutes, they ſeem to have been of [c] little Force ſince the Statute of 1 *Will. & Mar. Seſſ.* 2. *ch.* 2. *by which it is declared and enacted, That from and after that Seſſion, no Diſpenſation by* non obſtante *of or to any Statute, or any Part thereof, ſhall be allowed,* &c.

Sect. 18. But it ſeems plain, That Pardons of Manſlaughter, or any other Felony, except Murder or Rape, remain as they were at Common Law, for which I ſhall refer to *Sections* 8,9,10,11,12,13. from whence it follows, that the Pardon of the [d] felonious Killing of *J. S.* may be well pleaded to an Jndictment of Manſlaughter for killing him. But where ſuch a Pardon hath been pleaded to an Indictment of Manſlaughter by the Coroner's Inqueſt, the Court in Prudence hath refuſed [e] to allow it till the Fact hath been found Manſlaughter only, by a Jury directed by a higher Court.

Sect. 19. It hath been [f] adjudged, That where a general Act of Pardon expreſsly pardons all Petit Treaſons, but excepts Murders, it cannot be avoided by indicting one for Murder only, without the Word *Proditorie, &c.* who has been guilty of Petit Treaſon; for the leſs Offence being included, and conſequently drowned in the greater, cannot but be pardoned by a Pardon of it; and therefore the Exception of Murder in ſuch a Pardon muſt be conſtrued of ſuch Murder only as is ſpecially ſo called, and doth not amount to Petit Treaſon.

[a] Vide Bro. Charter. of Pardon, 10. Crompt. Juſt. 115. pl. 12. Keilw. 91. b. Cro. Ja. 495. March 213, 214. &c. *Yet in* Raſt. Ent. 455. *there are Precedents of Pardons of all Murders in general, without any* non obſtante, *and in* Dy. 124. pl. 39. *there is mention of a Pardon of all Treaſons,* &c. *but I ſuppoſe that the particular Treaſon was alſo expreſsly pardoned; for it appears that the Attainder for it was expreſsly mentioned.*

[b] 2 Keb. 363. pl. 11. 574. pl. 92. Show. Rep. 283, 284. 1 Sid. 366. pl. 2. 3 Mod. 37, 38. Kely. 24, 25. Moor, 752. pl. 1033. 12 Co. 18. 2 Jon. 56. Raſt. Ent. 455. pl. 3. 236. 2 H. 11. 574. pl. 92. 6 Co. 13. b.

the ſame Point is admitted and complained of S. P. C. 132. Lett. A. H. P. C. 250. Vide 3 Inſt. Crompt. 115. pl. 5, 6, 8.

[c] Show. Rep. 283, 284. Sty. Rep. *Rickabee's Caſe* Kely. 24, 25. 2 Jon. 56.

[d] 2 Keb. 363 pl. 11. 574. pl. 92.

[e] 2 Keb. 415. pl. 45.

[f] Dy. 50. pl. 4, 5. 235. pl. 19.

Sect.

Sect. 20. Alſo it hath been [a] adjudged, That a general Act of Pardon of all Felonies, *&c.* except Murder, ſhall extend to a *felo de ſe*; for notwithſtanding his Offence may in Strictneſs be called Murder, and conſequently may ſeem naturally enough to come within the Exception, yet ſince the general Words of an Act of Parliament are to be expounded according to the Common Uſe of them, and the Offence of *felo de ſe* and Murder are generally underſtood as diſtinct Offences, and as ſuch are diſtinctly treated by all Authors, who when they uſe the Word Murder, as ſignifying a certain Species of Offences, always mean by it the Murder of another; and farther, ſince there is greater Reaſon to except the Murder of another out of a Pardon, than that of a Man's ſelf, becauſe both the Law of God and Nature ſeem generally to require Blood for Blood, which can be applied only to the Murder of another, the Word Murder ſhall in ſuch an Exception be taonly to ſignify the Murder of another.

[a] 1 Lev. 8. 120. 1 Syd. 150. 1 Keb. 66. 548.

Sect. 21. Alſo it hath been [b] adjudged, That if a general Act of Pardon extend to all Felonies, Offences, Injuries, Miſdemeanors, and other Things done before ſuch a Day, it pardons a Homicide from a Wound given before the Day, whereof the Party died not till after the Day, becauſe the Stroke which is the Cauſe of the Death being pardoned, all the Effects of it are conſequently pardoned.

[b] Pl. Com. 401. Crompt. Juſt. 116. pl. 20. *This is left a Quære*, Dyer 99. pl. 65.

Sect. 22. As to the third Particular, *viz.* How far the Pardon of one Man may diſcharge another: it ſeems to be generally [c] agreed, That notwithſtanding all Felonies are [d] ſeveral, and conſequently a Pardon of one Man cannot be a direct Diſcharge of another, yet in ſome Caſes the Felony of one Man may be ſo far dependent upon that of another, that the Pardon of the one will by a neceſſary Conſequence enure to the Benefit of the other. As where the Principal pleaded his [e] Pardon, and was allowed it at the Common Law, [f] before his Attainder, or where he pleads and is allowed it at this Day before his [g] Conviction, in which Caſe it ſeems that the Acceſſary may by a neceſſary Conſequence take Benefit of it, becauſe he cannot be arraigned till after the Principal is convicted.

[c] Vide ſupr. Ch. 29. Sect. 41. Lett. l. 34 H. 6. 9. pl. 19. 42 Aſſ. pl. 16. Bro. Charter of Pardon, 33. Coro. 122 *or* 123. Fitz. Charter 15.
[d] Cro. Eliz. 30, 31.
[e] 22 Ed. 4, 7. pl. 22. *See the next Section*, Dyer, 34. pl. 21, 22.
[f] F. N. B. 115. Lett. e. 7 H. 4. 16. pl. 5. Supra Ch. 29. Sect. 41. Lett. l.
[g] Supra, Ch. 29. Sect. 41, 42. Supra Ch. 29. Sect. 43.

Sect. 23. It is [h] agreed, That if a Man be bound to the King as Surety for another, for the Payment of a certain Fine or other Debt due to the Crown, the Pardon of the Principal is a Diſcharge of the Surety alſo. But it ſeems to have been [i] holden as a general Rule, That where a Man is bound as Surety for another for the Performance of a future Act, the Diſcharge of the Principal before the Time of the Performance will not diſcharge the Surety, becauſe nothing was due to the King at the Time of ſuch Diſcharge: But this ſeems extremely nice; neither do the Caſes [k] brought for the Proof of it ſeem any way to come up to it. For as to the firſt of them, *viz.* that of the King's Releaſe of a Recogniſance for the Peace to the Principal, before it is forfeited, which ſhall not diſcharge the Sureties, it may be anſwered, that it will [l] not ſo much as diſcharge the Principal. And as to the other Caſe [m] cited for this Purpoſe, *viz.* that of the King's pardoning *J. N.* the building of ſuch a Houſe, for his building whereof *J. S.* is bound to the King, which ſhall be no Diſcharge to *J. S.* it may be anſwered, that as this Caſe is put, *J. N.* doth not ſeem to be bound

[h] 1 H. 7. 10. pl. 12. Fitz. Pardon, 4. Bro. Charter of Pardon, 36.
[i] *See the Books next above-cited.*
[k] *See the Books next above cited.*

at all, but only *J. S.* who therefore doth not ſeem to come under the Notion of a Surety, but of a Principal.

Sect. 24. As to the fourth Particular, *viz.* How far it is neceſſary that the Pardon of ſeveral Perſons for Felony be ſeveral: It ſeems [a] agreed, That the Pardon of *A. B. & C.* of all Felonies by them done, without adding, or any of them, is void; becauſe it ſuppoſes them jointly guilty, and extends to no other but joint Felonies, whereas all Felony is ſeveral [b] in each Offender, and cannot be joint. And the *Year-Book* of [c] 22 *E.* 4. goes ſo far as to hold, That the Addition of the Words, *or any of them*, will not help a Pardon beginning with ſuch joint Words, But this is [d] ſaid to be miſreported, and contrary to the Roll, and ſeems to be agreed [e] not to be Law at this Day.

Sect. 25. As to the fifth Particular, *viz.* Whether the King's Grant of a Protection, or of a Place of Truſt to a Traitor or Felon, carry with it an implied Pardon of his Crime: It is generally [f] agreed, That a Protection granted to a Felon ſhall be ſo far from enuring as a Pardon, that it ſhall not ſo much as privilege him from anſwering immediately to an Indictment, in the ſame Manner as if he had no Protection at all. But there is a ſhort [g] Note of a Caſe in *Fitzherbert's Abridgment*, where one being indicted and found guilty of Felony, produced a Charter whereby it appeared that the King had hired him to go into *Gaſcoign*, to the Army, whereupon the Court allowed the Charter. And Sir *Edward Coke* [h] ſuppoſes that the Offence was ſpecially recited in the Charter, and that ſuch Recital varies this Caſe from that of a Protection, which muſt be a formed Writ, and therefore can have no ſuch Recital. But however ſuch a Charter may enure as a [i] Suſpenſion of the Proceedings againſt a Felon for a Time, I do not ſee how it can be collected from this Caſe, that it ſhall enure as a Pardon of the Felony by Implication, which ſeems contrary to the Rule [k] of Law in other Caſes which will not ſuffer a Pardon of Felony to be carried beyond the expreſs Purport of it. However it was ſolemnly adjudged [l] in Sir *Walter Raleigh's* Caſe, That the King's Grant of a military Command to a Perſon attainted of High Treaſon, wherein he called him his true and loyal Subject, and gave him judicial Power over the Lives of others, did not pardon the High Treaſon, becauſe every Pardon of High Treaſon requires an expreſs mention of it, if not by the Common Law, yet at leaſt by the Statute of 13 [m] *R.* 2. Beſides if the Offence had been but Felony, yet after an Attainder it could not have been pardoned without an expreſs Mention both of the [n] Felony, and alſo of the [o] Attainder.

Sect. 26. As to the ſixth Particular, *viz.* What is required to make a good Pardon of Offences not capital: It hath been adjudged, That a Pardon of all Miſpriſions, Treſpaſſes, Offences and Contempts, will pardon a Contempt in making a [p] Falſe Return, *&c.* and a [q] Striking in *Weſtminſter-Hall*, and * Barretry, and even a [r] *Præmunire*: And it hath been laid down as a [ſ] general Rule, That it will pardon any Crime which is not capital. But it is ſaid [t] to have been holden, That ſucha Par-

[a] 22 Ed 4. 7. pl. 22. Bro. Charter of Pardon, 51. Dyer 34. pl. 21, 22. S. P. C. 102. Lett. D.

[b] *See the precedent Section.*

[c] 22 E. 4. 7. pl. 22.

[d] Bro. Charter of Pardon 51. Dy. 34 pl. 21, 22. S. P. C. 102. Lett. D.

[e] Dyer, 34. pl. 21, 22. H. P. C. 252.

[f] S. P. C. 104. Lett. D. Co. Litt. 130. b. 7 Ed. 4. 29. pl. 13. *Abridged* Fitz. Coro. 30. 3 Inſt. 239. 240. 2 Roll. Abr. 323. Lett. G. Fitz. Coro. 61. *But* Fitz. Coro. 122. *ſeems contrary.*

[g] Fitz. Coro. 239. *cited* 3 Inſt. 239, 240. S. P. C. 104. Lett. D. 2 Roll. Rep. 50.

[h] 3 Inſt. 240.

[i] Vide S.P.C. 104. Lett. D. 3 Inſt. 239, 240. 2 Roll Rep. 50.

[k] Vide ſupra, Sect. 12, *&c.*

[l] Cro. Ja. 494. 2 Roll. Rep. 50. State Trials, Vol. 1. fol. 187, 188, 877.

[m] Supra Sect. 15. 37 H. 6. 21, 22, 1 Keb. 852. pl. 56 Fitz. Coro. 122. *Point is not taken Notice of. And the contrary ſeems to be admitted*, Cro. Eliz. 685. pl. 21. Moor, 916. pl. 1299. *And is agreed*, 2 Mod 52.

[n] Vide ſupra Sect 8, 9. *Abridged* Fitz. Charter, 22. 1 Mod. 102.

[o] Vide ſupra Sect. 8, 9. Bro. Charter of Pardon, 25. Cro. Jac. 336.

[p] 36 H. 6. 24. pl. 21. 2 Bulſt. 299.

[q] 1 Lev. 106. 1 Sid. 211. 1 Mod. 102. Vide Kielw. 159 198 pl. 2. 1 Sid 170, 222. *the ſame Caſe is in* Keble 780 *but this*

[r] Watſon's Clergyman's Law, Ch. 5.

[ſ] 1 Sid 170, 222. *the ſame Caſe is in* Keble 780 *but this*

[t] Moor, 916. pl. 1299.

don will not extend to Simony, becauſe it is *malum in ſe*; but this ſeems to be no good Reaſon; for Barretry, and the injurious Striking of another, and generally all Offences at Common Law, are alſo *mala in ſe*; and yet it ſeems clear, that unleſs they be Capital, they may be pardoned by ſuch a Pardon.

Sect. 27. It hath been queſtioned * whether a general Pardon of all Treſpaſſes extends to Champerty or Confederacy. [a] 7 H. 4. 9. pl. 11.

Sect. 28. As to the ſeventh Particular, *viz.* Whether any Offence can be pardoned before it is committed: It ſeems agreed [b], That the King can by no previous Licence, Pardon, or Diſpenſation whatſoever, make an Offence diſpuniſhable which is * *malum in ſe*, *i. e.* unlawful in itſelf, as being either againſt the Law of Nature, or ſo far againſt the Publick Good, as to be indictable at Common Law. For a Grant of this Kind tending to encourage the Doing of Evil, which it is the Chief End of Government to prevent, is plainly againſt Reaſon, and the Common Good, and therefore void. Yet it ſeems to have been adjudged [c], That the King's Grant to the Biſhop of *Salisbury*, and his Succeſſors, having the Cuſtody of a Priſon, that they ſhall be quit from all Eſcapes, *&c.* having been allowed in *Eyre*, ſhall be a good Diſcharge from any Fine for a negligent Eſcape out of ſuch Priſon. And yet it is admitted that ſuch a Grant is no Diſcharge of a voluntary Eſcape; but it is ſaid, that it ſhall diſcharge a negligent one, becauſe it is puniſhable only by a pecuniary Penalty; and it is a general Rule, That the King may diſcharge a [d] Poſſibility of an Intereſt before it happens; as where the Tenants of his Manor are to be amerced for a Default in Reſpect of their Tenures, which the King may pardon beforehand. But if it be a good Rule that the King cannot pardon an Offence which is *malum in ſe* before it happens, and the negligent keeping of a Priſon be ſuch an Offence, which I think cannot be denied; and farther if it be alſo a good Rule, That where the King's Grant is plainly againſt the Common Good, as a Grant of this Kind ſeems to be, as tending to make a Gaoler leſs diligent in his Duty, by taking off the legal Puniſhment of his Negligence, I do not well ſee how this Caſe can be maintained. For it ſeems by no Means to follow that becauſe the King can diſcharge his Right to an Amercement before it happens, for a Default of his Tenants in a Matter relating barely to the Revenue of the Crown, which it is admitted that in the like Caſe any other Lord may do as well; therefore he can diſcharge a pecuniary Penalty for an Offence of a publick Nature before it happens. Neither doth it ſeem that a negligent Eſcape is only puniſhable by a pecuniary Penalty; for in ſome [e] Books it is ſaid to be fineable, by which it is implied, that the Offender may be impriſoned. Beſides it ſeems [f] agreed, That many negligent Eſcapes will forfeit the Office of keeping a Gaol, and therefore it is plain that a pecuniary Penalty cannot be ſaid to be their only Puniſhment. However this is the only Caſe I [g] meet with which looks like an Exception out of the General Rule, That the King cannot pardon an Offence that is *malum in ſe* before it happens.

[b] Finch of Law, 234, 235.
19 H. 6. 62. b.
37 H. 6. 4. b. 5. a.
11 H. 7. 11. 12. pl. 35.
Bro. Charter de Pardon, 76.
Davis's Rep. 75.
5 Co. 35. b.
12 Co. 29, 30.
* *But Chief Juſtice* Vaughan *in* Sorrel's *Caſe*, fol. 332, *&c. ſeems to find fault with the Diſtinction between* malum in ſe *and* Prohibitum, *as not fully anſwering all the Caſes concerning Diſpenſations.*
[c] 3 H. 7. 15. pl. 30. *Abridged* Fitz. Grant, 37. Bro. Patents 51. *Cited* S. P. C. 102. Lett. E.
[d] Dy. 52. pl. 2. 19 H. 6. 62, 63, 64. *Abridged* Bro. Patents, 16.
[e] Vide ſupra, 19. Sect. 31.
[f] Supra, Ch. 19. Sect. 29, 30.
[g] *But Chief Juſtice* Vaughan *in* Sorrel's *Caſe*, 335, 336. *ſeems to argue to the contrary.*

Sect. 29. But where [h] a Thing, which is lawful in its own Nature, is made unlawful by the Prohibition of an Act of Parliament only, as the carrying [i] Bell-metal or [k] Beer, *&c.* out of the Realm, importing [l] certain Merchandiſes in Foreign Ships, *&c.* ſelling [m] Wines beyond a

[h] Dav. Rep. 75, 76. Finch, 234, 235.
[i] Dyer 52. pl. 1, 2. [k] Dyer 92. pl. 18. [l] Dyer 54. pl. 17. 18. [m] Dyer 270. pl. 22.

certain Price, [a] exporting Wool to any other Place than *Calais*, selling [b] Wines without a Licence, multiplying [c] Gold or Silver, [d] Coining Money of a baſe Alloy, and [e] other Matters of the like Nature, it ſeems to have been formerly taken [f] for granted, that generally the King might diſpence with it as to a [g] particular Time, or Place, or Perſon, or even a * Corporation aggregate, *&c.* ſo far as the Publick was concerned in it. Yet where ſuch Diſpenſation cou'd not but be attended with a great Inconvenience, as the introducing a Monopoly, or fruſtrating the End for which the Law was made, as the licenſing [h] a particular Perſon to import Foreign Cards or Wines prohibited by Parliament, and [i] *a fortiori* if it tended to ſuſpend the whole Statute in general, it was commonly agreed to be void. Alſo where-ever an Act of Parliament gives a particular Intereſt, or Right of Action, to the Party [k] grieved by the Breach of it, as the Statutes of [l] *Mortmain*, which give an Entry to the next immediate Lord for an Alienation to a Corporation, the [m] Statutes againſt Maintenance, Forcible Entries, carrying Diſtreſſes out of the Hundred, [n] ſuffering one in Execution to eſcape, *&c.* which give an Action to the Party grieved by the Offence prohibited; it ſeems to have been always agreed, That no Charter by the King can be of any Force to bar the Right of the Party grounded upon ſuch Statute, becauſe it is a ſettled Rule, that the King cannot prejudice the Intereſt of the Party. Alſo where a Statute is expreſs, that the King's Charter againſt the Purport of it, whether with or without a Clauſe of *non obſtante*, ſhall be void; it is ſaid by Sir [o] *Edward Coke*, that no Clauſe of *Non obſtante* can diſpenſe with it, unleſs it tend to reſtrain ſome Prerogative, ſolely and inſeparably incident to the Perſon of the King, as the Right of pardoning, or of commanding the Service of the Subject, for the publick Weal, which being, [p] as he ſeems to argue, founded on the Law of Nature, are ſo far inſeparable from the King, that by a Clauſe of *Non obſtante* he may diſpenſe with any Statute whatſoever, which tends to deprive him of them. And on this Ground the Reſolution of the Judges in the [q] *Year Book* of *H.* 7. is ſaid to be maintainable, whereby it was adjudged, without any Difficulty, That where the Statute of 23 *H.* 6. *ch.* 8. expreſsly enacts, That Patents to Sheriffs to continue longer than a Year ſhall be void, and the Party diſabled to bear the Office of Sheriff notwithſtanding any Clauſe of *Non obſtante*, yet the King by the Clauſe of *Non obſtante*, might make a good Patent of ſuch Office for Life. Which is in Effect to ſay that let there be never ſo good Reaſons for the making a new Law for the Reſtraint of the Prerogative in any Particular relating to the Service of the Subject, yet it is not in the Power of the Legiſlature to make ſuch a Law; and yet no one will deny that where-ever the Law of Nature leaves a Matter indifferent, there the Law of Man ought to prevail. Neither is there any Pretence to ſay that the King has a Right by the Law of Nature to appoint Sheriffs, ſince it is plain that before the [r] Statute of 9 *Ed.* 2. the Freeholders choſe them, unleſs they had a Fee in their Office. And what Reaſon can there be that the Statute-Law which gives the Crown the Power of making Sheriffs, may not alſo qualify that Power as ſhall be thought convenient? But it is obſervable, that the Reſolution abovementioned, does not go upon any particular Reaſon which may di-

[a] 2 Rich. 2. 11. 12. pl. 26. 11 H. 7. 11, 12. pl. 35. 37 H. 6. 4. 2 H. 7. 6. b. Bro. Charter, de Pardon, 24, 76. Parliament, 98. 13 H. 7. 8. b. Fitz. Charter, 21. Grant, 33.
[b] Vaughan, 330. 1 Lev. 217. 1 Sid. 6, 7.
[c] Vaughan, 330.
[d] 11 H. 7. 11. pl 26. Vaugh. 344.
[e] 2 Rich. 3. 12. a. 2 H. 7. 6. b. 12 H. 3. a. *by* Martyn. Dyer 224. pl. 31. 225. pl. 35. 303. pl. 49.
[f] *See the Books above cited to the other Parts of this Section, and State Trials, Vol.* 3. *f.* 799 *to* 810. *f.* 845.
[g] 11 Co. 88. a. 7 Co. 36. b. 1 Lev. 218. Co. Litt. 99. a. Vide 3 Lev. 389.
* Vaugh 352, 1 Lev. 217.
[h] Vaugh 344. 11 Co. 88. *See the Books above-cited.*
[i] State Trials, Vol. 3. fol. 793, 796, 808. 809.
[k] Supra, ch. 26. Sect. 64. 37 H. 6. 4. a. b. 2 Rich. 3. 12. a. Vaugh. 342. 343. Infra, S 34.
[l] 11 Co. 98, 99. Vide Keilw. 134. pl. 15.
[m] Vaugh. 342, 343.
[n] Dyer 162. pl. 50. 297. pl. 24.
[o] 12 Co. 18. 19.
[p] 7 Co. *Calvin's Caſe*, 14. a.
[q] 2 H. 7. 6. b. *Abridged* Fitz. Grant, 33. Bro. Patents, 102. Vide Finch of Law, 234, 235. 13 H. 7. 8. b. Plow. Com. 502. b.
[r] Inſt. 558, 559

But now by 7 & 8 W. 3. 37. *ſuch Licence may be granted by the King alone.*

ſtinguiſh the Caſe of a Sheriff, from any other Caſe, but only on the King's Power by *Non obſtante* to diſpenſe with the Statutes concerning the tranſporting Wool, the pardoning of Murder, and the expreſſing the Quantities of the Land granted by the King's Patents, and ſuch like, which becauſe they may be diſpenſed with by Clauſes of *Non obſtante*, it is taken for granted, that the Statute of 23 *H.* 6. might as well be diſpenſed with by them; as if it were a plain Conſequence that becauſe Statutes which ſay nothing concerning the Clauſe of *Non obſtante*, may be diſpenſed with by it; therefore a Statute which expreſsly provides againſt it, may alſo as well be diſpenſed with by it.

Sect. 30, It is [a] ſaid, That the King may diſpenſe with the Statutes of *Mortmain*, without any Clauſe of *Non obſtante*; and this ſeems very reaſonable, becauſe thereby he only gives up that Right of Entry which thoſe Statutes give him for the Forfeiture, which every meſne Lord might alſo do as well ſo far as he had a Right by thoſe Statutes. Alſo it ſeems to be holden [b] by ſome Books, That the Clauſe of *Non obſtante* was only requiſite in Reſpect of ſuch Statutes which expreſsly ſaid it ſhould be void. But the far greater Number of [c] Authorities ſeem to be to the contrary.

Sect. 31. But the diſpenſing Power was carried ſo very high in a late Reign, and found to be of ſuch dangerous Conſequence, as to make the Execution of the moſt neceſſary Laws in Effect precarious, and merely dependent on the Pleaſure of the Prince. And it ſeeming highly incongruous that the King ſhould have a kind of abſolute unlimited Power, in diſpenſing with Laws wherein the Church and State have the higheſt Intereſt, when at the ſame Time he has no Power at all to diſpenſe with any Law which veſts the leaſt Right or Intereſt in a Private Subject, it was found by Experience neceſſary to *declare and enact by* 1 Will. & Mar. Seſſ. 2. Ch. 2. *That no Diſpenſation by* Non obſtante *of or to any Statute, or any Part thereof, be allowed, but that the ſame ſhall be held void and of none Effect, except a Diſpenſation be allowed in ſuch Statute. But it is provided that no Charter, Grant, or Pardon, granted before* 23 October, 1699, *ſhall be any ways impeached or invalidated by that Act, but that the ſame ſhall be and remain of the ſame Force and Effect in Law, and no other, as if the ſaid Act had never been made.*

Sect. 32. It hath been always [d] agreed, That the King never could diſpence with a Statute before it was made.

Sect. 33. As to the eighth Particular, Whether there be any Offence which cannot be pardoned after it is committed: I take it to be a ſetled Rule [e], That the King may pardon any Offence whatever, whether againſt the Common or Statute Law, ſo far as the Publick is concerned in it, after it is over, and conſequently [f] may prevent any popular Action on a penal Statute by a Pardon of the Offence before any Suit commenced by an Informer. But while a Publick Nuſance continues unreformed, it ſeems * agreed, That the King cannot wholly pardon it, becauſe ſuch Pardon would take way the only Means of compelling a Redreſs of it. But it hath been [h] holden by ſome, That a Pardon of ſuch Offence will ſave the Party from any Fine for the Time precedent to the Pardon.

[a] Co. Litt. 99. Plowd. Com. 502. b. Dyer 269. pl. 19. *where the Grant is made* ex certa Scientia. Cont. *by* Dy. *in* Plow. Co. 502. Vide Raſt. Ent. 302. a. Fitz. Grant, 36. Entry congeable, 28. Plow. Com. 334. b.

[b] Finch 234, 235. Plow. Com. 502.

[c] 2 H. 7. 6. b. *Abridged* Bro. Patents, 109. Fitz. Charter 33. 2 Rich. 3. 12. a. 43 Aſſ. pl. 19. Vide Dyer 52. pl. 1. 54. pl. 17. 29. pl. 17, 18. 270. pl. 22. 303. pl. 49. 352. pl. 25.

[d] Finch. 235. 1 Sid. 6. Dy. 52. pl. 2.

[e] *See the Books cited to the other Parts of this and the next Section.*

[f] Vide ſupr. ch. 26. Sect. 64. *See the following Section.*

* 3 Inſt. 237. Vaugh. 333. 37. H. 6. 4. b, Plow. Com. 487. Vide Fitz. Aſſiſe, 445. Keilw. 134. pl. 15. 12 Co. 29, 30. State Trials, Vol. 1. fol. 578.

[h] 12 Co. 30.

Sect. 34. As to the ninth Particular, *viz.* How far a Pardon may be of Force againſt the Private Intereſt of the Subject: I take it to be a [a] ſettled Rule, That the King cannot by any Diſpenſation, Releaſe, Pardon or Grant whatſoever, bar any Right, whether of Entry, or Action, or any legal Intereſt, Benefit or Advantage whatſoever before veſted in the Subject; and upon this Ground it ſeems clear, That the King can no way bar any Action on a Statute by the Party [b] grieved; nor even a popular [c] Action by a Common Informer, if commenced before his Pardon or Releaſe; and that he cannot diſcharge a Recognizance [d] for the Peace, before it is forfeited.

Sect. 35. And upon the ſame Ground, it ſeems to be clearly agreed, That as the Releaſe of a Perſon robbed, or of the Wife or Heir of a Perſon killed, will not [e] bar an Indictment, or a Demand of Execution at the Suit of the King, ſo neither will a Pardon [f] by the King be any Bar to an Appeal, except only where it is carried on at the Suit of the King, after a Nonſuit of the Party, in which Caſe it may be barred by a [g] Pardon in the ſame Manner as an Indictment. But if one who appears to be attainted of Felony, whether by Outlawry, or otherwiſe, on an Appeal carried on at the Suit of the Party, get a Pardon from the King, he [h] muſt ſue a [i] *Scire facias* againſt the Appellant before the Pardon ſhall be allowed, unleſs the Appellant appear [k] *gratis*, and confeſs that he will ſue no farther, *&c.*

Sect. 36. If the Appellant appear on the *Scire facias*, it is [l] certain that he may pray Execution notwithſtanding the Pardon: But if the Sheriff have returned a [m] *Scire facias*, or two [n] *Nihils*, and the Appellant appear not [o] upon Demand, the Appellee ſhall be diſcharged. Yet if the Appeal be of Death, and the Sheriff return the Appellant dead, there are ſome [p] Authorities that a *Scire facias* ought to go againſt the next Heir to the deceaſed, but the greater Number of [q] Authorities ſeem to be to the contrary.

Sect. 37. There is ſaid [r] to be no need of any *Scire facias* on ſuch a pardon againſt the Lords mediate or immediate, becauſe the Pardon no way tends to reverſe the Attainder, and conſequently can do no Hurt to their Title of Eſcheat, *&c.* grounded on the Attainder, but rather affirms it.

[a] Sup. S. 29. 8 H. 6. 19. *Abridged* Fitz. Grant, 4. 37 H. 6. 4. b. *Abridged* Bro. Charter de Pardon, 24. 2 Rich. 3. 12. a. Pl. Com. 487. a. b. Fitz Aſſiſe, 445. Cro. Ca. 199. 2 Roll. Abr. 178. Lett. S. 304. Lett. S. Cro. Ja. 159.

[b] Supra ch. 26. ſect. 64. 2 Rich. 3. 12. a. Vide Keilw. 134 pl. 15. Fitz. Chart. 21.

[c] Supr. ch. 26. Sect. 64.

[d] 37 H. 6. 4. b. *Abridged* Fitz. Grant, 21. Bro. Charter de Pardon, 24. 2 Rich. 3. 12. a. 5 Ed. 4. 3. pl. 25.

[e] 8 H. 4. 22. pl. 17. *Abridged* Fitz. Charter, 26. Bro. Charter de Pardon, 13. Recogniſ. 22. 11 H. 7. 12. pl. 35.

[f] *See the Authorities cited to the other Parts of this Section,* and Bro. Appeal 150. 3 Inſt. 237.

[g] Supra Ch. 25. Sect. 13. Bro. Appeal, 33. 12 Co. 29, 30. Book 1. ch. 60. Sect. 17. Appeal 27, 33, 41, 128.

[h] Dp. 34. pl. 20. S. P. C. 104. Lett. B. H. P. C. 251. 11 H. 4. 11. pl. 24. 11 H. 4. 48. pl. 23. 9 H. 7. 5. pl. 1. 2 Rich. 3. 8. pl. 17. 9 H. 4. 1. pl. 2. 13 H. 4. 6. pl. 14. 38 H. 6. 13. pl. 26. *and the Authorities cited to the other Parts of producing a* Scire facias, Sci' fa' 73. *Year and Day* Coro 87. *not awarded.* 251.

[i] *That the Appellee may have ſuch a* Scire facias *of Courſe on ſuch a Pardon, without Releaſe or other Deed from the Appellant.* 9 H. 7, 5. pl. 1. *Abridged* Fitz. Scire facias, 56. Bro. 166. 2 Rich. 3. 8. pl. 17. S. P. C. 104. Lett. B. Cont. 11. H. 4. 16. pl. 36. *Abridged* Bro. *That there was no need of any* Scire facias *where an Appeal was abated by the King's Death, and the* were paſſed. 2 H. 7. 10. pl. 5. Bro. Charter of Pardon, 69.

[k] 11 H. 4. 16. pl. 36. Fitz. *Same Caſe* Bro. Confeſſion, 12. *and* Jour in Court. 21. *But 'tis made a Wonder that a* Scire facias *was*

[l] S. P. C. 104. Lett. B. H. P. C. 251. 11 H. 4. 1. pl. 2.

[m] S. P. C. 104. Lett. B. H. P. C. 477. Vide Dy. 168 pl. 17. 172. pl. 10. 11.

[n] Finch Fitz. Scire 4. 6. pl. 14. 1. *Abridged* peal, 141.

[o] 2 Rich. 3. 8. pl. 17. 9 H. 4. 1. pl. 2. *Abridged* facias 63. Bro. Charter de Pardon, 14.

[p] 11 H. 4. 11. pl. 24. 11 H. 4. 48. pl. 23. 19 H. *Abridged* Fitz. Coro. 266. Vide Fitz. Coro. 85. Supra ch. 23. Sect. 38, & 41.

[q] 9 H. 7. 5. pl. Fitz. Scire fac' 56. Bro. Scire facias 166. Appeal 88, 144. 38 H. 6. 13. pl. 26. Bro. Ap- Charter de Pardon, 28. Supra Ch. 23. Sect. 38, 41.

[r] Dyer 34. pl. 20.

Sect. 38. If ſeveral Perſons be outlawed in an Appeal, and one of them be pardoned, and get his Pardon allowed on the Non-appearance of the Appellant on a *Scire facias, &c.* and afterwards another of them get his Pardon, it ſeems that he ſhall take no [a] Advantage of the Appellant's Default on the firſt *Scire facias*, but muſt ſue out his *Scire facias, &c.* in the ſame Manner as if there had been no ſuch Default.

Sect. 39. It is holden by great * Authorities, That if a Perſon be convicted of Manſlaughter upon an Appeal of Death, the King may pardon the burning in the Hand; for which this Reaſon is given by Sir *Edward Coke*, that it is no Part of the Judgment at the Suit of the Party, but a collateral and exemplary [b] Puniſhment inflicted by the Statute of 4 *H.* 7. 13. But this is made a *Quære* by [c] others, and the principal Caſe wherein it is ſaid to have been reſolved, is very differently [e] reported, and was never [f] adjudged; And the Ground laid down that the King may pardon it becauſe it is no Part of the Judgment at the Suit of the Party, by which it ſeems admitted, that if it were part of the Judgment, the Law wou'd be otherwiſe, ſeems rather to make againſt it than for it; for there are [g] Precedents of expreſs Judgments, *quod cautariſetur in manu ſua læva.* Alſo it is [h] admitted, That where a Defendant is to have a certain Impriſonment, *&c.* at the Suit of the Party upon a Statute, the King cannot diſpenſe with it, except in ſome ſpecial [i] Caſes, wherein it may be reaſonably intended that ſuch Impriſonment was given by the Statute, by way of Satisfaction to the Publick Juſtice only, in which Caſe it ſeems agreed, [l] That the King may diſpenſe with it, as it is ſaid that he may, with finding of Sureties by one convict on the Statute againſt Treſpaſſes in Parks. But it ſeems duobtful, whether the Statute of 4 *H.*7. 13. which appoints the burning of the Hand can well admit of ſuch a Conſtruction; for the Words are, *Whereas upon Truſt of the Privilege of the Church, diverſe have been more bold to commit Murder*, &c. *becauſe they have been admitted to their Clergy as oft as they have offended; for avoiding of ſuch preſumptuous Boldneſs, it is enacted, That every Perſon not being in Orders, who hath been once admitted to his Clergy, be not again admitted thereto, and that every ſuch Perſon convict*, &c. *ſhall be marked*, &c. from whence it ſeems plain, That the Statute expreſsly intends ſuch Marking as a Diſcouragement of the Offence; and it ſeems difficult to give a Reaſon why it ſhould be conſtrued to mean it only as a collateral and not as a direct Puniſhment. Neither doth it ſeem a plain Reaſon, that becauſe the Statute intended it as an exemplary Puniſhment, the King may diſpenſe with it; for ſurely the Execution of an Appellee attainted of Murder, and the perpetual Impriſonment of a Clerk delivered to the Ordinary upon a Conviction on an Appeal, who cou'd not make his Purgation, were alſo exemplary Puniſhments; and yet it is generally [m] agreed, That the King never cou'd diſpenſe with them. And therefore upon the whole this ſeems to be a Point that deſerves to be farther conſidered.

Sect. 40. But granting that the King may pardon the burning the Hand in an Appeal, it ſeems a very reaſonable [n] Conſequence that the Party ſhall immediately be delivered by Force of the Statute of 18 *Eliz.* which ſays, That after burning he ſhall be delivered, which ought to have this Conſtruction, that he ſhall be delivered after burning, where he is to be burned.

[a] 1 H. 4. 1. pl. 2. Fitz. Scire facias 63. *But* Bro. Charter de Pardon, 14. *in the Abridgment of the ſame Caſe holds the contrary.*

* H. P. C. 251. 3 Inſt. 237. Hob. 294. *Cited* State Trials, Vol. 4. fol. 382.

[b] *But my Lord* Hobart *f.* 294. *ſays, That it is no Part of the Judgment, nor ſo much as in the Natnre of the Puniſhment, but only a Mark to notify that the Party may have his Clergy but once.*

[c] Raym. 369, 370. Dyer 202. pl. 68. 261. pl. 26. Cro. Eliz. 464. *the firſt*, pl. 13.

[e] Biggins Caſe, 5 Co. 50. Cro. Eliz. 632. pl. 27. 682. pl. 14. Moor 571. pl. 782.

[f] Raym. 371.

[g] Raſt. Ent. 1. b. pl. 2. 56. a. pl. 1. *Yet it is omitted* 55. b. pl 6.

[h] 5 Co. 50. b. Dy. 261. pl. 26. 323. pl. 28.

[i] 3 Inſt. 171. 237. 2 Inſt. 200, 439.

[l] Dy. 238. pl. 34, 35. 3 Inſt. 171. 200. pl. 68. Cro. Ca 596, 597. Hob. 294.

2 Inſt. 200. [m] Vide ſupra Sect. 35. 5 Co. 50. b. Dy. 261. pl. 26. *Yet 'tis made a Quære*, Dy. *whether the King cou'd not pardon ſuch Impriſonment.* [n] 5 Co. 50. b. Vide Ch. 33. Sect. 131.

Sect. 41. It seems to have been always agreed, [a] That the King's Pardon will discharge any Suit in the Spiritual Court *ex officio*; Also it seems to be [b] settled at this Day, That it will discharge any Suit in such Court *ad instantiam partis pro reformatione morum*, or *salute animæ*, as for Defamation, or laying violent Hands on a Clerk and such like; for such Suits, like those in the Star-Chamber, are in Truth the Suits of the King, tho' prosecuted by the Party. Also it seems to be [c] agreed, That if the Time to which such Pardon hath Relation be prior to the Award of Costs to the Party, it shall discharge them: And it seems to be the general [d] Tenour of the Books, That tho' it be subsequent to the Award of the Costs, yet if it be prior to the Taxation of them, it shall discharge them; because nothing appears in certain to be due for Costs before they are taxed. [e] Also if a Person be imprisoned on a Writ of *Excommunicato capiendo* for his Contumacy in not paying Costs, and afterwards the King pardon all Contempts, it seems that he shall be discharged of such Imprisonment without any *Scire facias* against the Party, because it is grounded on the Contempt which is wholly pardoned; and the Party must begin anew to compel a Payment of the Costs.

Sect. 42. But it seems agreed, [f] That a Pardon shall not discharge a Suit in the Spiritual Court, any more than in a Temporal, for a Matter of Interest or Property in the Plaintiff, as for Tithes, Legacies, Matrimonial Contracts, and such like. Also it is [g] agreed, That after Costs are taxed in a Suit in such Court at the Prosecution of the Party, whether for a Matter of Private Interest, or *pro reformatione morum*, or *pro salute animæ*, as for Defamation, *&c.* they shall not be discharged by a subsequent Pardon.

Sect. 43. If the Offence be pardoned after Costs are taxed, and then the Defendant appeal to a Superior Court, which gives new Costs, whether upon the Affirmance or Reversal of the first Sentence, they shall * not be avoided by Reason of the Pardon, because they are not given in Respect of the Offence, but of the Award of the former Costs, which being taxed before the Pardon, are not avoided by it, and therefore the Appeal was proper for determining whether they were well given or not. But if the Offence for which the Suit was in the Spiritual Court be pardoned, hanging an Appeal, and such Pardon relate to a Time precedent to the Award of the Costs, and after such Pardon the Appellant desert his Appeal, and the Spiritual Court award Costs against him in Respect of such Desertion, it seems, [h] That he may have a Prohibition, because the Pardon having discharged the Costs of the first Suit as well as the Offence, made the Appeal to be to no Purpose. It is [i] said, That Costs taxed to the Party grieved for a Contempt in a Court of Equity are not discharged by a general Pardon of all Contempts, because it is the Common Course of a Court of Equity to award such Costs at the Pleasure of the Judge. But it hath been questioned whether Costs taxed by the Prothonotary upon an Attachment to the Party grieved be not discharged by a general Pardon of all Contempts.

Sect. 44. It was insisted † by the House of Commons in the Earl of *Danby*'s Case, and is enacted by 12 & 13 *W.* 3. *Ch.* 2. *That no Pardon under the Great Seal be pleaded to an Impeachment by the Commons in Parliament.*

Sect. 45. As to the Tenth particular, *viz.* Whether a Pardon may be conditional: It seems agreed, [k] That the King may extend his Mercy on what Terms he pleases, and consequently may annex to his Pardon any Condition that he thinks fit, whether precedent or subsequent, on the Performance whereof the Validity of the Pardon will depend.

Sect.

[a] 5 Co. 51. Cro. Eliz. 684. pl. 18. Cro. Ca. 113, 114.
[b] 5 Co. 51. Winch, 125. Cro. Ja. 335. Hob. 81. Cont. Cro. El 684 pl 18.
[c] Cro Jac. 335. Cro. Ca. 9.
Vide Cro. Ca. 667, 668.
[d] 2 Roll. Abr. 304. pl. 1. 299. pl. 8. 5 Co. 51. Latch 190. Noy 85, 91. Cro. Ca. 46, 47.
Vide Cro Ca. 9. *wherein 'tis holden that an Award of Costs, tho' they have not been taxed, shall not be avoided by a Pardon, but the other Books seem contrary.*
[e] 1 Jon. 227. 2 Rol. 178. Lett. S. *Contra adjudged* Cro. Jac. 159. *And 'tis made a Quare* Cro. Ja. 212. *whether an Excommunication can be discharged by the King's Pardon,* 8 Co. 68, 69
[f] 5 Co. 51.
[g] Latch 190. 5 Co. 51. Cro. Ca 46, 47. *and the Authorities cited to the precedent Section.*
* Cro. Co. 46, 47. Winch 125.
[h] 2 Roll. Ab. 304. pl. 2. Noy 85. Latch 155.
[i] 2 Vent 194.
† State Trials, Vol. 2. fol. 199, 723.
[k] Moor 466. pl. 662. Co. Lit. 274. b.

Sect. 46. As to the eleventh Particular, *viz.* Where a Pardon is void in Respect of a wrong Recital: It being a general Rule, [a] That where ever the King appears to have been deceived his Grant is void, I take it to be agreed, That if it appear from the Recital of a Pardon, that the King was misinformed either as to the [b] Nature of the Case, or the Proceedings thereupon, the Pardon is void; as where the [c] King pardons a Man for a Felony whereof he stands indicted, or indicted or attainted, and in Truth he never was indicted, *&c.*

Sect. 47. How a Pardon of Felony shall be avoided by Statute in Respect of a wrong Suggestion, hath been already shewn, *Sect.* 10.

Sect. 48. As to the second general Point, *viz.* What is the Effect of a Pardon: I take it to be settled at this Day, That the Pardon of a Treason or Felony even after a Conviction or Attainder, does so far clear the Party from the Infamy and all other * Consequences of his Crime, that he may not only have an Action [d] for a Scandal in calling him Traitor or Felon after the Time of the Pardon, but may also be a good Witness notwithstanding the [e] Attainder or Conviction; because the Pardon makes [f] him as it were a new Man, and gives him a new Capacity and Credit.

Sect. 49. And it hath been [g] admitted that the King's Pardon of the burning of the Hand on a Conviction of Manslaughter hath the same Effect as to this Purpose, as the burning would have had, which is [h] agreed to restore the Party to his Credit.

Sect. 50. But it hath been adjudged, [i] That a Pardon is of no Manner of Force, as to this Purpose, till it have passed the Great Seal.

Sect. 51. Also it is said, [k] That the Pardon of a Felony will not make an Arrest for it, by one who did not know of the Pardon, unlawful, because such Arrests being for the Publick Good are to be favoured; and therefore shall not be actionable by Reason of such a Pardon, as Scandalous Words shall be, because they deserve no Favour.

Sect. 52. I do not [l] find it clearly settled, Whether the Pardon of a Conviction of Perjury make the Party a good Witness.

Sect. 53. If a Man be convicted, or deprived, or otherwise punished for an Offence during a Session of Parliament, and at the same Session an Act passeth which pardons the Offence: It seems agreed, [m] That the Conviction or Deprivation, *&c.* are *ipso facto* avoided, because the Act taking Effect from the first Day of the Session, it now appears that the Offence was pardoned at the Time of the Conviction, *&c.* Also it hath been adjudged, That where an Act of Parliament expresly pardons such and such Crimes from a certain Day before the Session, it thereby avoids all [n] Convictions and [o] Deprivations, and [p] Awards of Costs and Amerciaments, [q] *&c.* for such Crimes, whether such Convictions, *&c.* were before or after the Session, because it appears to be the Intent of the Parliament that such Crimes shall no way be punished, which cannot take Effect if such Convictions, *&c.* continue in Force.

[a] Yelv. 43, 47, 48. Cro. Jac. 18, 34. 2 Roll. Abr. 188. Lett. N. O. Dy. 352. pl. 26. Cro. Ja. 548. [b] Raym. 13. 1 Sid. 41. [c] 3 Inst. 238. H. P. C. 251.

* Vide 1 Keb. 940 pl. 59. Fitz Coron. 154, 281. 1 Ass. 3. Cro. Ca. 55. 1 Sid. 222. 5 Co. 49.

[d] Hob. 67, 81, 82. Moor 863 pl. 1187. 872. pl. 1213. 1 Roll. Abr. 87. pl. 6. Owen, 150. 1 Brownl. 10. Raym. 23. Cont. Cro Ja. 622. pl. 14.

[e] State Trials Vol. 2. *f.* 269. Vol. 3. *f.* 552, 553 585, 596, 610. Vol. 4 119. 5 Mod. 15, 16. Raym. 369, 370.

But the contrary is held. Bulst. 154. *and* State Trials, Vol. 2 520 *to* 524. Raym. 379, 380.

[f] State Trials, Vol. 4. 119.

[g] State Trials, Vol. 4. 379 *to* 386.

[h] Supra Ch. 33. Sect. 129.

[i] *By the Lords in the Earl of* Warwick's Trial, State Trials, Vol. 4. 379 *to* 386. [k] Hob. 67, 82. [l] Vide State Trials, Vol. 2. 520 *to* 524. 1 Keb. 780. pl. 24. 5 Mod. 15, 16. Raym. 369, 370, 379, 380. Kely. 37, 38. 1 Sid. 52, 221, 222. 3 Lev. 426. [m] Cro. Eliz 41. pl. 4. Watson's Clergyman's Law, Ch. 6. *pag.* 31. *in the Folio Edition.* Vide Latch. 22. [n] 6 Co. 14. a. Cro. Ca. 67, 68, 114, 115. Vide Latch, 22, 141. 8 H. 5. 2. pl 6. 35 H. 6. 1, 2. Fitz. Fines, 21. Pardon, 6. [o] Burton's Case. 6 Co. 13. b. 14. a. *But this Case hath often been denied to be Law,* 1 Keb. 780. pl. 24. 1 Sid. 164, 222. [p] Latch, 190. Noy 91. Cro. Ca. 47. [q] 36 H. 6 24, 25. 37 H. 6. 21 Fitz. Charter 22. 5 Co. 49. Co. Litt. 126 b. Cro. Ja. 64 Moor, 394, pl. 511. Cro. Eliz 768, 778. *Whether an Excommunication be pardon'd by a general Pardon of all Contempts, &c.* Supra Sect. 41.

Sect.

Sect. 54. But it seems to be a settled [a] Rule, That no Pardon by the King, without express Words of Restitution, shall divest, either from the King or [b] Subject, an Interest either in Lands or Goods, vested in them, by an Attainder or Conviction precedent. Yet it seems [c] agreed, That a Pardon prior to a Conviction, shall prevent any Forfeiture either of Lands or Goods.

Sect. 55. It hath been adjudged, [d] That a Clause of Release of all Judgments and Executions in a general Pardon, extends as well to Debts due to the King by Assignment or Forfeiture, as to those originally due to him, and that it doth not restore them to the Person who assigned or forfeited them, but extinguishes them in the Hands of the Debtor.

Sect. 56. It seems agreed, That notwithstanding the King's Pardon to a Simonist coming into a Church contrary to the Purport of 31 *El.* 6. or to an Officer coming into his Office by a corrupt Bargain, contrary to the Purport of 5 *&* 6 *Ed.* 6. 16. may save [e] such Clerk or Officer, from any Criminal Prosecution in Respect of the corrupt Bargain; yet shall it not [f] enable the Clerk to hold the Church, nor the [g] Officer to retain the Office, because they are absolutely disabled by Statute.

Sect. 57. Also it seems [h] agreed, That the King's Pardon cannot salve the Corruption of Blood by Attainder of Treason or Felony.

Sect. 58. As to the third general Point, *viz.* Whether a Pardon may be waived: I take it to be [i] agreed, That a general Pardon by Parliament cannot be waived, because no one by his Admittance can give to a Court a Power to proceed against him, when it appears that there is no Law to punish him.

Sect. 59. But it is [k] certain, that a Man may waive the Benefit of a Pardon under the Great Seal, as where one who has such a Pardon doth not plead it, but takes the General Issue, after which he shall not resort to the Pardon.

And now I am to shew in what Manner a Pardon is to be taken Advantage of, which I shall consider,

1. In Relation to a general Pardon by Parliament.
2. In Relation to a particular Pardon under the Great Seal.

Sect. 60. And first, as to the pleading of a general Pardon by Parliament: It seems [l] agreed, That if any Persons are excepted out of it, the Court is not bound, and some [m] have holden that it hath no Power in Discretion to give any Person the Benefit of it, unless it be pleaded. Also it seems generally agreed, That if the Body of such a Pardon either excepts divers particular Persons by Name, or excepts all those who come under a general Description, as all those who adhered to *J. S. &c.* no one can demand the Benefit of it, without expressly shewing in the [n] first Case that he is not one of the Persons excepted; and in the latter [o] Case, that he is not included in such Description. And if he

[a] 1 Lev. 8. 120. 2 Mod. 53. 1 Keb. 695, 757, 921, 817, 922. 3 Mod. 101. 241. 242. 1 Saund. 362, 363. 1 Sid. 167, 168, 264. Theloal lib. 1. ca. 15. Sect. 8. [b] Dy. 34. pl. 20. Finch of Law 467. Theloal lib. 1. ca. 15. Sect. 3. [c] 5 Co. 110. b. Owen, 87. State Trials Vol. 4. 119. 2 Mod. 53. [d] 1 Lev. 120, 121. 1 Keb. 695, 757, 817, 921, 922. 1 Saund. 362, 363. 1 Sid. 167, 168, 264. [e] Supra Sect. 26, 33. Owen, 87, 88. [f] Hetl. 104. Co. Lit. 120, a. 3 Inst. 154. Watson's Clergyman's Law, *ch.* 5. *pag.* 28. *in the Folio Edition.* [g] 3 Inst. 154. 3 Bulst. 90, 91. *See* B. 1. ch. 67. Sect. 5. 1 Keb. 781. pl. 24 [h] Co. Litt. 8. a. 391. b. 3 Inst. 233, 240, 241. [i] *See* B. 1. ch. 64. Sect. 63. S. P. C. 173. Lett. A. 169. 103. Lett. A. Bro Notice, 1.

26 H. 8. 7. pl. 34. 11 H. 4. 41. pl. 8. Bro. Coro. 30. 200. Indictment, 2. Fitz Coro. 89. Crompt, Just. 115. pl. 13, [k] S. P. C. 173. Lett. A. 169. N Bro. Coro. 200. Kely. 24, 25. [l] H. P. C. 252. 8 E. 4. 7. pl. 1. Cro. Ca. 32. Crompt. Just. 115 pl. 13, 14. Cro. El. 768. pl. 9 778. pl. 11. 6 Co. 79. b. Moor, 770. pl. 664. Raym. 23. 2 Inst. 234 2 Roll. Rep. 307. Cro Eliz. 4. pl. 2 Moor, 619 pl. 845. [m] 1 Leon. 300. Cro. Eliz 125. pl. 4. Cont. Lane 71. Moor 394. Vide 5 Co. 49. Cro. Ca. 32. Yel. 126. [n] 8 E. 4. 7. pl. 1. S. P. C. 103. Lett A. Fitz. Pardon 3. Bro. Pleadings, 124. Cont. 2 Leon. 26. [o] 8 E. 4. 7 pl. 1. S. P. C. 103. Lett. A. Fitz. Pardon 3. Plowd. Com. 103. a. 484. b. Bro. Chart. 66. 4 H. 7. 8. pl 9. Dy. 27. pl. 180. State Trials, Vol. 2. fol. 5.

hap-

happen to be of the ſame Name with one of the Perſons excepted by Name, it is ſaid that it will not [a] be ſufficient for him to aver that he was none of the Perſons excepted, without adding that he is a different Perſon from ſuch other of the ſame Name. Which, how it can be tried, unleſs it appear by ſome Additions to the Name in the Statute, may deſerve to be conſidered. But if the Body of a Statute be general as to all Perſons whatſoever, and afterwards ſome are excepted in the Proviſoes, [b] perhaps it may be ſufficient to plead ſuch a Pardon, without any Averment That he who pleads it is none of the Perſons ſo excepted; it being a [c] general Rule, That where a Man is within the general Words of the Body of a Record or Deed, which is qualified by ſubſequent Proviſoes, it is ſufficient for him to bring his Caſe within ſuch general Words, and that the Exceptions in ſuch Proviſoes ought to be ſhewn of the other Side.

[a] 8 E. 4. 7. pl. 1. S. P. C. 103. Lett. A. Fitz. Pardon, 3.

[b] Vide 1 Lev. 26. 4 H. 7. 8. pl. 9. Raym. 23.

[c] 1 Lev. 26, 88. Raym. 65. Cro. Ca. 515.

Sect. 61. But it ſeems agreed, [d] That the Court is ſo far bound to take Notice *ex Officio* of a general Pardon by Parliament, which extends to all Perſons in general without Exception, That it cannot proceed againſt any Perſon whatſoever as to any of the Offences pardoned, tho' he be ſo far from pleading it, or praying the Benefit of it, that he does all he can to [e] waive it,

[d] H. P. C. 252. Plow. Com. 83. b. 26 H. 8. 7. pl. 34. Bro. Notice 1. Dy. 28. pl. 188.

Sect. 62. Alſo where a general Act of Pardon excepts certain Kinds of Crimes, there is [f] no need to aver that the Crime whereof a Perſon is indicted is not one of ſuch excepted Crimes; but the Court ought judicially to take Notice whether it be excepted or not.

[e] 5 Co. 49. 3 Inſt. 234. 11 H. 4. 41. pl. 8. Bro. Coro. 30.

Sect. 63. Alſo where ſuch a Statute excepts only one Particular Perſon, it hath been [g] ſaid, That there is no need of an Averment that a Perſon indicted is not ſuch Perſon; but that the Court is to take Notice whether he be or not.

Indictment, 2. 2 Roll. Rep. 307.

[f] Noy, 100. Black *verſus* Allen. Cro. Ca. 449. Moor, 620, pl. 845.

[g] Vide ſupra Sect. 58.

Secondly, As to the taking Advantage of a particular Pardon under the [h] Great Seal, I ſhall obſerve only the following Particulars.

Sect. 64. Firſt, That it will be [i] Error to allow a Man the Benefit of ſuch a Pardon, unleſs it be pleaded.

Vide 2 Leon. 26. Crompt. Juſt. 116. pl. 17. 8 Co. 68. 3 Inſt. 234.

Sect. 65. Secondly, That he who pleads ſuch a Pardon, ought to [k] produce it *ſub pede ſigilli*, tho' it be a Plea in Bar, becauſe it is preſumed to be in his Cuſtody, and the [l] Property of it belongs to him. Yet if a Man plead ſuch Pardon without producing it, it ſeems [m] that the Court may in Diſcretion indulge him a farther Day to put in a better Plea; and that at ſuch Day he may perfect his Plea by producing the Charter. Alſo it ſeems [o] agreed, That there is no need in a Plea of *Autrefoits acquit, &c.* to produce the Record immediately, becauſe it is pleaded in Bar, and he that pleads it hath neither the Cuſtody nor Property of it.

[g] 11 Co. Eliz. 125. pl. 4. Vide 2 Leon. 26.

[h] *That no ſuch Pardon is good unleſs under the Great Seal, and conſequently that Articles of Surrender cannot be pleaded as amounting to a Pardon,* State Trials, Vol. 1. fol. 578, *&c.* [i] Cro. Eliz. 153. pl. 33. [k] H. P. C. 252. S. P. C. 103. Lett. B. 11 H. 4. 41. pl. 6. [l] *See the Books above-cited, and* Cro. Ja. 70, 317. Cro. Ca. 441, 442. 1 Jon. 377. 1 Sid. 311. Cro. El. 217, pl. 2. 547, pl. 21. 716. pl. 42. [m] 11 H. 4. 41. pl. 6. S. P. C. 103. Lett. B. [o] Vide Supra, Ch. 35. Sect. 2.

Sect. 66. Thirdly, That if there be a Variance [a] between the Record on which a Man is convicted or attainted, and his Charter of Pardon; yet if there be no Repugnancy to intend that the same Person or Thing are meant in both, it may be supplied by proper Averments: And therefore if one be indicted by the Name af *J. S.* [b] Yeoman, and pardoned by the Name of *J. S.* Gentleman, or indicted by the Name of *B.* the Tasker, and pardoned by the Name of *B.* the Son of *W.* he may make good the Variance by averring, that he is the same Person intended in such Indictment and Pardon: Or if in an Indictment [c] of the Death of *J.S.* the Stroke be supposed to have been given on the first of *August*, and in the Pardon on the third, the Party may aver that the Death of one and the same *J. S.* are intended in both. And if such a variant Pardon be pleaded without any such Averment, it seems that the Court may in Discretion give the Party a farther Day either to [d] perfect his Plea, or to [e] purchase a better Pardon. And there are some [f] Instances in the old Books, where upon such Variance the Court took an Inquiry of Office, whether the same Person were meant in both Records.

Sect. 67. Fourthly, That no such Pardon can be pleaded together with, or after the General Issue, unless it be of a Date subsequent to the Time of the pleading such Issue, because otherwise it is waived by it; as hath been more fully shewn, *Sect.* 58.

Sect. 68. Fifthly, [g] That the Party shall not be obliged to lay the Stress of his Case on any particular Words or Clause in such Pardon, but may take Advantage of the whole.

Sect. 69. Sixthly, That after an * Amerciament in the King's Bench hath been estreated into the Exchequer, and the Party being taken upon Process from thence hath insisted upon a Pardon, and been denied any Benefit from it, yet he may be brought by a *Habeas Corpus cum causa* to the King's Bench, because the Record remains there, and the Transcript is only sent into the Exchequer, and may plead the same Pardon in the King's Bench; and if it be adjudged sufficient, may have a *Supersedeas* to the Barons, *&c.*

Sect. 70. Seventhly, That while the Statute of 10 *Ed.* 3. 2. stood in Force, (which required all Persons pardoned for Felony to find Sureties for their Good Behaviour before the Sheriff and Coroners within three Monrhs, *&c.*) no Pardon of [i] Felony could be allowed, without a Writ out of Chancery, commonly called a Writ of Allowance, testifying that the Party had found [k] Sureties, *&c.* according to that Statute, unless it were dispensed with by a Special Clause of *Non obstante, &c.* But the Necessity hereof is taken away by 5 *&* 6 *W. &* M. 13. which hath repealed the said Statute of 10 *Ed.* 3. *but hath provided, That the Justices before whom any Pardon for Felony shall be pleaded, may at their Discretion, remand, or commit the Person that pleads it to Prison, till he or they shall enter into a Recognizance with two sufficient Sureties for the Good Behaviour for any Time, not exceeding seven Years. Provided that if such Person be an Infant or Feme-covert, he or she may find two sufficient Sureties, who shall enter into a Recognizance for his or her, being of the Good Behaviour, as is aforesaid.*

[a] H. P. C. 253. Supra Ch. 35. Sect. 3, 4, 5. 3 Inst. 240. S. P. C. 104. Lett. a. Crompt. Just. 116. pl. 18.

[b] Keilw. 58. a. Dy. 34. pl. 20. 1 Roll. Rep. 368. Fitz. Coro. 294. *but* 18 E. 3. 33. pl. 11. *Abridged* Fitz. Brief, 364. *seems contrary.*

[c] 11 H. 4. 41. pl. 6. *Abridged* Fitz. monstrans de faits, 128. Bro. Variance 31. Coro. 29. Charter de Pardon, 15. *But note, That none of these Books make mention of any Averment, but seem to imply that the Pardon was allowed without it, notwithstanding the Variance.*

[d] 11 H. 4. 41. pl. 6. Fitz. monst. de faits, 128.

[e] 3 Inst. 240. 1 Sid. 41. 26 Ass. pl. 46 Raym. 13. Fitz. Office de Court, 34. Bro. Charter de Pard. 32. Office de Court, 25.

[f] Fitz. Coro. 294. 3 Ass. pl. 15. *Abridged* Fitz. Coro. 166. Bro. Cor. 190, or 191. Variance, 63. *But* Bro. *in abridging this Case under the Title of Charter of Pardon*, 29. *makes this Remark*, quod mirum mihi: Bro. Charter 25. 1 Keb. 9. pl. 11. *a Pardon of Treason*, Cro. Eliz. 814. pl. 2. 7. pl. 5.

[g] 37 H. 6. 4 a. Fitz. Chart. 21. S. P. C. 103. Lett. C.

* 36 H. 6. 24, 25. Fitz. Chart. 22. Crompt. Just. 115. pl. 15. 3 H. 7. pl. 5. Plow. Com. 502. b.

[i] 1 Sid. 41. Raym. 13. 3 Inst. 234, 235. *But there never was any Necessity for such Writ upon* Noy. 31.

[k] *That a Breach of the Recognizance avoided the Pardon.* 3 H. 7. pl. 5. S. P. C. 103. Lett. C. Crompt. Justice, 115. pl. 16.

Sect.

Sect. 71. Eighthly, That the Judges may inſiſt on the uſual Fee of Gloves [a] to themſelves and Officers, before they allow a Pardon.

[a] Fitz. Coro. 294. 4 E. 4. 10. b. de pace, 88. a.

2 Jon. 56. 1 Sid. 452. pl. 18. Kely. 25 Pulton

CHAP. XXXVIII.

Of the General Iſſue.

Sect. 1. HAving ſhewn already, *Ch.* 23. *Sect.* 126 and 135. that the General Iſſue is pleadable in capital Caſes, together with any other Plea in Bar or Abatement, which is not repugnant to it; and that it may alſo be pleaded even after ſuch Plea found againſt a Defendant; and having alſo ſhewn, *Ch.* 37. *Sect.* 59. That the Plea of the General Iſſue amounts to a Waiver of a Pardon; and *Ch.* 26. *Sect.* 66. *&c.* what is a good General Iſſue to an Information on a penal Statute; and in the ſame Chapter, *Sect.* 73, 74. In what Manner the Iſſue is to be joined on ſuch an Information, and where it is to be tried, I ſhall in this Place take Notice only of the following Particulars;

Sect. 2. Firſt, That in a criminal Information or Indictment in the [b] King's Bench, for a Miſdemeanor, and alſo in an Indictment before [c] Juſtices of the Peace, the Iſſue is well joined for the King by the Words *A. B. qui pro Rege ſequitur ſimiliter, &c.* without any Addition, ſhewing that *A. B.* is the proper Officer for this Purpoſe; for it ſhall be intended that he was ſufficiently known to be ſuch by the Court. But in all [d] Precedents I meet with of Informations of Intruſion, the Iſſue for the King is joined by the Attorney General, naming himſelf ſuch.

[b] 1 Sid. 230, 231. Coke's Entr. 363. a. [c] Cro. Ca. 315. [d] 1 Co. 17. a. 27. a. Coke's Entr. 372. a. 379, a. 381, a. 385, a. 387, b. 390. b. Raſt. Ent. 412. a.

Sect. 3. Secondly, That in Indictments of [e] capital Crimes, after the Defendant hath pleaded *quod ipſe in nullo eſt inde culpabilis, & inde de bono & malo ponit ſe ſuper patriam*, (which is the general Form of pleading the General Iſſue in capital Caſes, both in [f] Indictments and [g] Appeals,) the Uſage ſeems to have been immediately to award Proceſs againſt the Jury, without any expreſs joining of Iſſue on the Part of the King. But in the Precedents of Appeals of Felony, whether by an [h] Appellant or [i] Approver, generally the Iſſue is expreſsly joined by the Appellant and Approver as well as the Appellee.

[e] Coke's Ent. 352, a. 353, b. 354, b. 355, b. 356, b. 358, a. 360, a. 361. a. Raſt. Ent. 385. pl. 5. 9. [f] *See the Precedents above-cited.* [g] Coke's Ent. 57. b. Raſt. Ent. 47, a. b. 48, a. 49. a. b. 50. a. b. 51. a. 52, a. 53, a. 54, a. 55. b. [h] *See the Precedents cited to immediately*

Sect. 4. Thirdly, That it ſeems [k] the better Opinion, that if an Iſſue be joined in Proceſs on a Recognizance for the Peace, whether the Defendant killed *J. S.* and ſuch Iſſue be found for the King, yet ſhall it not eſtop the Defendant to plead Not guilty to an Indictment or Appeal for the Death of the ſame *J. S.*

the precedent Letter. But in Raſt. Ent. 43. b. *after the General Iſſue with an* &c. *the Proceſs is awarded againſt the Jury.* [i] Raſt. Ent. 42. b. [k] 7 H. 4. 35. b. Bro. Appeal 19.

CHAP.

CHAP. XXXIX.

Where a Priſoner ſhall be allowed Counſel, and a Copy of the Indictment, &c.

A Perſon having pleaded Not guilty is to be tried either,

1. By his Country, or
2. By his Peers, or
3. By Battle.

But before I conſider what is proper to each of theſe in their Order, I ſhall endeavour to ſhew,

1. In what Caſes a Priſoner may have Counſel to aſſiſt him in his Defence.
2. Where he may have a Copy of the Indictment.

Sect. 1. As to the firſt of theſe Particulars, I take it to be a ſettled [a] Rule at Common Law, That no Counſel ſhall be allowed a Priſoner, whether he be a [b] Peer or Commoner, upon the General Iſſue, on an Indictment of Treaſon or Felony, unleſs ſome Point of Law ariſe, proper to be debated.

Sect. 2. This indeed many have complained of as very unreaſonable, yet if it be conſidered, that generally every one of Common Underſtanding may as properly ſpeak to a Matter of Fact, as if he were the beſt Lawyer; and that it requires no manner of Skill to make a plain and honeſt Defence, which in Caſes of this Kind is always the beſt; the Simplicity and Innocence, artleſs and ingenuous Behaviour of one whoſe Conſcience acquits him, having ſomething in it more moving and convincing than the higheſt Eloquence of Perſons ſpeaking in a Cauſe not their own. And if it be farther conſidered that it is the [c] Duty of the Court to be indifferent between the King and Priſoner, and to ſee that the Indictment be good in Law, and the Proceedings regular, and the Evidence legal, and ſuch as fully proves the Point in Iſſue, there ſeems no great Reaſon to fear but that, generally ſpeaking, the Innocent, for whoſe Safety alone the Law is concerned, have rather an Advantage than Prejudice in having the Court their only Counſel. Whereas on the other Side, the very Speech, Geſture and Countenance, and Manner of Defence of thoſe who are Guilty, when they ſpeak for themſelves, may often help to diſcloſe the Truth, which probably would not ſo well be diſcovered from the artificial Defence of others ſpeaking for them.

[a] 3 Inſt. 29. 137. 7 H. 4. 35. b. Finch, 386. 2 Bulſt. 147. Bro. Coro. 54. Fitz. Coro. 31. Cro. Ca. 147. S. P. C. 151. B. 9 E. 4. 2. pl. 4. 1 Lev. 86. Dr. & Stud. B. 2. ch. 48. State Trials, Vol. 1. f. 70. V. 2. f. 1002. *See the Books cited to the other Parts of this Chapter.*

[b] State Trials, Vol. 1. f. 70. 265, 614. Vol. 4. f. 355. 3 Inſt. 29. Ruſhworth's Collections, Part 2. Vol. 1. f. 94.

[c] 2 Bulſt. 147. 3 Inſt. 29.

Sect. 3. But the Law allows a Defendant the same Benefit of Counsel in an [a] Appeal, whether Capital or not Capital, as in any other Action. Perhaps for this Reason among [b] others, because Appeals are presumed to be generally carried on with greater Heat and Spleen than Indictments, and yet are not so much to be favoured as being for the most Part rather grounded on a Desire of private Revenge than of publick Justice; and therefore the Defendant shall have at least the same Advantage in them as in Common Actions.

Sect. 4. Also upon Indictments, the Court will never refuse to assign a Prisoner Counsel to argue a doubful Point of Law, happening to arise at or after his Trial; as where it shall appear questionable whether the Facts proved, if true, fully [c] amount to the Crime charged against him; or whether the Persons offered to be Evidence against him be [d] legal Witnesses in Respect of such or such Exceptions against them; or whether certain Persons returned [e] of his Jury can be lawful Jurors, in Respect of certain Objections against them; or whether the † Indictment or ¶ Process, *&c.* be strictly legal: In all which Cases the Prisoner must [f] propose the Point, and [g] if the Court think it will bear a Debate, they will assign him Counsel to argue it.

Sect. 5. Also where-ever a Prisoner hath a [h] Pardon or other [k] Special Matter to plead to an Indictment, or an [l] Error to Assign in order to reverse an Outlawry, the Court will of Course assign him Counsel. And it is [m] said, That for such collateral Matters any one may be of Counsel for a Prisoner without any Assignment.

Sect. 6. But if a Question arise on the Trial of a Peer concerning the Course of Parliamentary Proceedings, the Lords will not [n] suffer it to be argued by Counsel, but will debate it among themselves.

Sect. 7. There is a Case in the *Year-Book* of [o] *H.* 7. Where a Serjeant at Law, as *amicus Curiæ*, offered his Opinion to the Court, concerning the Trial of an Indictment of Death, That it was not proper to proceed in it till the Year and Day were passed, nor doth he appear to have been any way reprehended for it. [p] But it is not safe for any one to be either Counsel or Solicitor to one in Prison for a capital Crime, in order to prepare him for his Trial, without an Assignment from the Court. But by Leave of the Court Prisoners have sometimes been indulged the Assistance of Counsel, not only to [q] advise them in Prison, but * also to stand by them at the Bar: But it is said, [r] That in Strictness they ought not to be prompted by them as to Matters of Fact, [s] nor to have the Assistance of any Papers drawn up by Counsel to prepare them for their Trial.

Sect. 8. After a Prisoner hath had Counsel assigned him, the Court will not [t] discharge them without his Consent, tho' they desire it, but will sometimes add others to them.

Sect. 9. It is [u] said, That the Court cannot assign an Appellee any of the King's Counsel; but that if they will they may be either for or against him.

[a] S. P. C. 151. B. Dr. & Stud. B. 2. ch. 48. Dy. 296. pl. 20. Keilw. 176. b. Finch of Law 386. 1 Bulst. 85. 9 E. 4. 2. pl. 4. Bro. Coro. 54. Fitz. Coro. 31.

[b] Dr. & Student, B. 2. ch. 48.

[c] State Trials, Vol. 1. f. 569. Rushworth's Stafford 671.

[d] State Trials Vol. 2. 520.

[e] State Trials, Vol. 3. f. 135.

† 3 Inst. 29. 1 Lev. 68. Cro. Ca. 147.

¶ 3 Inst. 29. 137. 6 Co. 14.

[f] 3 Inst. 137. State Trials, Vol. 2. f. 762.

[g] State Trials, Vol. 2. 694, 701, 709, 763, 764. Vol. 3. 867.

[h] 3 Inst. 29, 137. Vide 26 Ass. pl. 46. Fitz. Office de Court, 34.

[k] 1 H. 7. 23. a. Bro. Coro. 128, 129. Finch of Law 386.

[l] 2 Jo. 180. Cro. Ca. 365.

[m] 2 Jo. 180.

Yet in the Year-Book of 1 H. 7. 13. *the Court refused it, because the Party was of very bad Fame.*

[n] State Trials, Vol. 2. 694, 699. [o] 7 H. 4. 36. a. S. P. C. 151. B. 3 Inst. 29, 137. [p] State Trials, Vol. 2. fol. 272, 273, 712, 743, 763, 768. [q] State Trials, Vol. 3. f. 133. * State Trials, Vol. 2. fol. 614. [r] State Trials, Vol. 2. fol. 614. [s] State Trials, Vol. 1. f. 732. Vol. 2. f. 743, 762, 763, 770. [t] State Trials, Vol. 2. f. 711, 712. [u] 1 Bulst. 85.

Sect. 10. It having been found by Experience that Priſoners have been often under great Diſadvantages from the want of Counſel, in Proſecutions of High Treaſon againſt the King's Perſon, which are generally managed for the Crown with greater Skill and Zeal than ordinary Proſecutions, it is enacted by 7 *Wil.* 3. 3. *That all and every Perſon and Perſons whatſoever, that ſhall be accuſed and indicted for High Treaſon, whereby any Corruption of Blood may or ſhall be made to any ſuch Offender or Offenders, or to any the Heir or Heirs of any ſuch Offender or Offenders, or for Miſpriſion of ſuch Treaſon, ſhall be received and admitted to make his and their full Defence by Counſel learned in the Law: And in Caſe any Perſon or Perſons ſo accuſed or indicted ſhall deſire Counſel, the Court, before whom ſuch Perſon or Perſons ſhall be tried, or ſome Judge of that Court is authoriſed and required, immediately upon his or their Requeſt, to aſſign to ſuch Perſon and Perſons, ſuch and ſo many Counſel, not exceeding two, as the Perſon or Perſons ſhall deſire, to whom ſuch Counſel ſhall have free Acceſs at all ſeaſonable Hours; any Law or Uſage to the contrary notwithſtanding.*

Sect. 11. But it is provided, *S.* 3. *That any Perſon being indicted of ſuch Treaſon may be outlawed*, &c. *and where by the Law, after ſuch Outlawry, he may come in and be tried, he ſhall upon ſuch Trial have the Benefit of the ſaid Act.*

Sect. 12. And it is farther provided, *S.* 12, 13. *That nothing in the ſaid Act ſhall extend, or be conſtrued to extend to any Impeachment or other Proceedings in Parliament whatſoever. And alſo that it ſhall not any ways extend to any Indictment of High Treaſon, nor to any Proceedings thereupon, for counterfeiting his Majeſty's Coin, his Great or Privy Seal, his Sign Manual, or Privy Signet.*

Sect. 13. As to the ſecond Particular, *viz.* Where a Priſoner may have a Copy of the Indictment againſt him: It is ſaid, [a] That by the Common Law it is always denied in Caſes of Treaſon or Felony. Yet if a Priſoner take a legal Exception to an Indictment, it is ſaid [b] that the Court will grant him a Copy of ſo much as concerns his Exception. Alſo if he have ſuch Matter to plead which cannot well be put into Form without Knowledge of the Charge againſt him as laid in the Indictment, as *Autrefoits acquit, &c.* it is [c] ſaid that the Court will give him the Heads of the Indictment, to enable him to have his Plea ſo drawn as to ſuit the Charge againſt him.

[a] 1 Lev. 68. Moor, 666. State Trials, Vol. 1. f. 644. Vol. 2. fol. 711, 763. Vol. 3. fol. 861, 862, 863, 864. Show. 131. 1 Sid 85.
[b] Lev. 68. 1 Sid. 85.
[c] State Trials Vol. 2. fol. 711.

Sect. 14. But it is enacted by 7 *W.* 3. *That every Perſon and Perſons indicted for High Treaſon, except for counterfeiting the Coin, or the Great or Privy Seal, or Sign Manual or Privy Signet, ſhall have a true Copy of the whole Indictment, but not the Names of the Witneſſes, five Days at the leaſt before Trial, to adviſe with Counſel thereupon, to plead and make their Defence, his or their Attorney, or Agent, requiring the ſame, and paying the Officer his reaſonable Fees for writing thereof, not exceeding five Shillings for the Copy of every ſuch Indictment.*

Sect. 15. What Exceptions may be taken to ſuch Indictment, and when, hath been ſhewn, *Chapter* 25. *Sect.* 148, 149, 150, 151.

CHAP.

CHAP. XL.

From what County the Jury is to be returned, &c.

FOR the better understanding what more particularly relates to a Trial by the Countrey in capital Cases, having shewn *Ch. 5. Sect.* 18. That by Vertue of a special Commission, Justices of *Oyer* and *Terminer* may sit in one County, for the Trial of a Fact in another by the proper Jurors. And having also shewn, *Ch. 23. Sect.* 92. what is a proper Place from whence a Visne may come, I shall in this Place only consider,

1. From what County the Jury is to be returned.
2. By Vertue of what Process.
3. Before what Court.
4. How they may be challenged.

As to the first of these Particulars, *viz.* From what County the Jury is to be returned: I shall endeavour to shew,

1. From what County they are to be returned for the Trial of the General Issue.
2. From what County for the Trial of a Foreign Plea.

Sect. 1. As to the first Point, *viz.* From what County a Jury is to be returned for the Trial of the General Issue: I take it to be [a] agreed, That [b] regularly by the Common Law they must be returned in all Cases, for the Trial of the General Issue from the same County wherein the Fact was committed. And it is said, That in an Appeal of Death, where the Wound was given in one County and the Party died in another, the Jury [c] ought to be returned from each County before the Statute of 2 & 3 *Ed.* 6. 24. since which the whole may be tried either upon an [b] Indictment or Appeal, in the County wherein the Death happens.

Sect. 2. But it is enacted by 33 *H.* 8. 23. *That if any Person being examined by the King's Council, or three of them, upon any Manner of Treasons, Misprisions of Treasons, or Murders, do confess any such Offences, or that the said Council, or three of them, upon such Examination, shall think any Person so examined, to be vehemently suspected of any Treason, Misprisions of Treasons or Murder, That then in every such Case by the King's Commandment, his Majesty's Commission of* Oyer *and* Terminer *under the Great Seal, shall be made by the Chancellor of* England *to such Persons and into such Vills and Places as shall be named and appointed by the King, for the speedy Trial, Conviction, or Delivery of such Offenders; which Commissioners shall have Power to enquire, hear and determine all such Treasons, Misprisions of Treasons and Murders, within the Places limited by their Commission, by such good and lawful Persons as shall be returned before them by the Sheriff, or his Minister, or any other having Power to return Writs and Process for that Purpose, in whatsoever other Shire or Place within the King's Dominions, or without*

[a] S.P.C. 154. Dy. 132. pl. 75. 286. pl. 5. Fitz. Coro. 194. 3 Inst. 27. 26 Ass. pl. 32.
[b] Vide supra, Ch. 5. Sect. 18. Vide infra, Sect. 5.
[c] Book 1 Ch. 31. Sect 13. Supra, Ch. 23. Sect. 35. Fitz. Coro. 59, 60.
[d] Vide supra, Ch. 25. Sect. 35.

without, such Offences were done or committed, and that in such Cases, no Challenge for the Shire or Hundred shall be allowed.

Sect. 3. It hath been [a] adjudged, That this Statute so far as it relates to Treason done within the Realm, is repealed by 1 & 2 *Ph.* & *Ma.* 10. which enacts, That all Trials for Treason shall be according to the Common Law. But as to [b] Murder and [c] Misprision of Treason, it still seems to continue in Force. And as to High [d] Treason done without the Realm, it doth not seem material whether it it be in Force or not, because that is fully provided for by 35 *H.*8.2. as hath been more fully shewn *Ch.*25. *Sect.* 47, 48, 49, 50, 51.

Sect. 4. It hath been [e] adjudged, That the Word *Murder* in this Statute shall have the same strict Construction as in the [f] Statutes which take away the Benefit of the Clergy from Murder, and consequently shall not extend to one examined before the Council as Accessary only, and not as Principal; for Murder is one Offence, and the being Accessary to it is another.

Sect. 5. Having shewn already that he who steals [g] Goods in one County and carries them into another, or does a Fact in one County which proves a * Nusance to another, may be indicted or appealed in either, from whence it follows, that he may be also tried in either: Having also [h] shewn, that he who marries two Wives, the first in a Foreign Country, and the second in *England*, may be indicted and tried in *England*; and that he who takes a Woman by Force out of one County, and carries her into another and there marries her, [i] may be indicted and tried in the second County: And that Felonies in [k] *Wales* may by Force of 26 *H.* 8. 6. be indicted and tried in the next adjoining *English* County: And that Treasons upon the Sea, [l] or in a Foreign [m] Country, and Felonies [n] and Piracies upon the Sea, may be indicted and tried in any County in *England*; and that an [o] Accessary in one County to Murder in another, may be appealed and tried in the County wherein the Stroke was given; and that an Accessary to Murder, or any other Felony in one County, may be indicted † and tried in the County wherein he was Accessary; I shall refer to the Places cited in the Margin for the farther Consideration of these Matters.

Sect. 6. As to the second Point, *viz.* From what County the Jury is to be returned for the Trial of a Foreign Plea, That is, the Plea of issuable Matter alledged in a different County from that wherein the Party is indicted or appealed, as where a Man indicted in the County of *A.* [p] pleads that he was taken out of a Sanctuary in the County of *B.* Or where one appealed by a Woman for the Death of her Husband in one County, [q] pleads That since the Death of her Husband she hath married *J. S.* in another County; it is [r] agreed, That by the Common Law such Pleas can only be tried by Juries returned from the Counties wherein they are alledged: And therefore if Issue be joined on such Matters before a Court which hath no Jurisdiction out of the County wherein it sits, there seems to be [s] no Remedy by the Common Law, but to remove the Proceedings by *Certiorari* into the King's Bench, which having a Jurisdiction throughout the whole Kingdom, will award proper Process for the Trial.

[a] 1 And. 104, 105.
[b] 1 And. 194, 195.
[c] Vide supra, Ch. 25. Sect. 145. Bro. Coro. 220. 3 Inst. 24.
[d] Vide Dyer, 286, pl. 45.
[e] 1 And. 194, 195.
[f] Supra Ch. 33. Sect. 26. B. 1. Ch. 31. Sect. 11.
[g] B. 1. Ch. 33. Sect. 9. Supra, Ch. 23. Sect. 47. Ch. 25. Sect. 36.
* Supra, Ch. 25. Sect. 35.
[h] B. 1. Ch. 43. Sect. 7. Supra Ch. 25. Sect. 37.
[i] B. 1. ch. 42. Sect. 10. Supra, Ch. 25 Sect. 38.
[k] B. 1. Ch. 31. Sect. 14. Supra, Ch. 25. Sect. 39, 40.
[l] Supra, Ch. 25. Sect. 41, 42, 43.
[m] Supra Ch. 25. Sect. 46 to 52.
[n] B. 1. Ch. 37. Sect. 12, 12, 13, 14, 15. Supra, Ch. 25. Sect. 41 to 46.
[o] Supra, Ch. 29 Sect. 49.
† Supra, Ch. 25. Sect. 52. and Ch. 29. Sect. 50, 51, &c.
[p] Keilw. 175. pl. 10.
[q] Dyer 296. pl. 20.
[r] 3 Inst. 27. S. P. C. 154. Keilw. 175. pl. 10. Dy. 296. pl. 20. 286. pl. 5.

H. P. C. 255. Vide 23 H. 8. 14. Sect. 5. [s] Keilw. 175. pl. 10. Dy. 296. pl. 20. Vide Dyer

Sect.

Sect. 7. But *for the more ſpeedy Trials of Murders and Felonies, it is enacted by* 23 H. 8. 14. Par. 5. *That all Manner of Foreign Pleas triable by the Countrey, upon any Indictment for any Petit Treaſon, Murder or Felony, ſhall be forthwith tried before the ſame Juſtices afore whom the Party ſhall be arraigned, and by the Jurors of the ſame County that ſhall try the Petit Treaſon, Murder or Felony, whereof he ſhall be ſo arraigned, without any further Reſpite or Delay, in whatſoever County or Counties, Place or Places of this Realm, the Matter of the ſame Pleas be ſuppoſed or alledged.*

Sect. 8. But this Statute extending neither to Indictments of High Treaſon, nor to Appeals, it [a] is ſaid, That a Foreign Iſſue therein muſt ſtill be tried by the Jury of the County wherein it is alledged.

[a] 3 Inſt. 27. S. P. C. 154. H. P. C. 255. Vide Dyer, 296. pl. 20.

CHAP. XLI.

Of Proceſs againſt Jurors.

FOR the better underſtanding the Nature of Proceſs againſt Jurors in Criminal Caſes, I ſhall endeavour to ſhew,

1. Where a Panel may be returned without any Precept by a bare Award.
2. In what Manner the Proceſs is to be returnable.
3. Where a *Venire* may be joint or ſeveral.
4. What Proceſs may be awarded by *Proviſo*.
5. In what Caſes, and in what Manner a *Tales* is grantable.
6. Where it is neceſſary to return a Panel into Court, before an Inqueſt can be taken upon it, and where the Priſoner may have a Copy of it.

[b] Fitz. Inqueſt, 55. 3 Inſt. 168. 2 Inſt. 568. H. P. C. 158. 256. Crompt. Jur. 128. S. P. C. 155. Lett. E.

[c] *Yet 'tis ſaid that the Law is (otherwiſe if they have a Special Commiſſion.* Fitz. Inq. 55. 3 Inſt. 168. Crompt. Juriſ. 128.

[d] Fitz. Inq. 55. Crompt. Jur. 128. 3 Inſt. 168.

Sect. 1. As to the firſt Point, *viz.* Where a Panel may be returned without any Precept by a bare Award, it is [b] agreed, That Juſtices of [c] Gaol-Delivery, may have a Panel ſo returned by the Sheriff, without any Precept or Writ; and the [d] Reaſon given for it is, That before their coming they always make a general [e] Precept to the Sheriff in Parchment under their Seals, *to bring before them at the Day of their Seſſions twenty-four out of every Hundred,* &c. *to do thoſe Things which ſhall be injoined them on the Part of the King,* &c. And therefore it is ſaid that they need not make any other Precept for the Return of a Jury, for the Trial of any Iſſue joined before them, But that their bare [f] Award that the Jury ſhall come is ſufficient, becauſe there are enow for that Purpoſe ſuppoſed to be preſent in Court, whom the Sheriff may return immediately whenever the Court ſhall require their Service. Alſo it is ſaid, [g] That a Jury may be ſo returned before Juſtices of Peace at their Seſſions, becauſe the [h] Precept

2 Inſt. 568. [e] Vide Raſt. Ent. 384. b. 385. a. pl. 1. Cro. Ca. 448. [f] *For the Form of ſuch an Award ſee* Raſt. Ent. 385. pl. 5. 6. State Trials, Vol. 4. fol. 182. [g] 2 Inſt. 568. *Adjudged* 1 Sid. 364. pl. 11. [h] *See* Lambard's Juſt. B. 4. Ch. 2. *and* Crompt. Juſtice, 232.

for the Summons of the Seſſions hath a Clauſe to the ſame Effect for the Summons of twenty four out of every Hundred, *&c.* Yet I much queſtion whether this Matter do not rather depend on [a] Practice, and the conſtant Courſe of Precedents, then any Argument from the Reaſon of the Thing. For the [b] Precept to the Sheriff from Juſtices of *Oyer* and *Terminer*, in order for the holding of their Seſſions, hath in Effect the very ſame Clauſe for the bringing of twenty-four before them, out of each hundred, at the Day of their Seſſions, *&c.* And yet it ſeems [c] agreed, That they cannot have a Jury returned for the Trial of an Iſſue joined before them, by Force of a bare Award, but ought to make a particular Precept to the Sheriff for that Purpoſe under their Seals.

[a] Vide 3 Inſt. 164. 1 Sid. 364. pl. 11. [b] Raſt. Ent. 443. b. pl. 1, 2 [c] H. P. C. 162, 256. 3 Inſt. 164. 2 Inſt. 568.

Sect. 2. It ſeems [d] agreed, That by the Courſe of the King's Bench no Jury can be returned into it from a Foreign County, without proper Proceſs, under the [e] Seal of the Chief Juſtice, *&c.* But [f] *Quære* if it may not be returned for the Trial of an Indictment, *&c.* in the ſame County wherein it ſits, by a bare *præceptum eſt*, *&c.*

[d] S.P. C. 154. Lett. B. Vide 27 H. 6. 10. pl. 4. Supra, Ch. 27. Sect. 16. [e] Supra, Ch. 27 Sect 8. [f] Vide Dyer 118. pl. 78.

Sect. 3. As to the ſecond Point, *viz.* In what Manner the Proceſs againſt Jurors is to be returnable, it ſeems agreed, That it may be returnable immediately into the Court of King's Bench for the Trial of an Indictment in the ſame County wherein it ſits, whether for a Crime committed in ſuch County, or for a [g] Treaſon, *&c.* beyond the Sea. But that for the Trial of Indictments removed thither by *Certiorari* from other Counties, there [h] ought to be fifteen Days between the *Teſte* and Return of every Proceſs.

[g] Vide Ch. 25. Sect. 47 to 72. [h] 2 Roll. A. 626. pl. 4, 5. Supra Ch 3. Sect. 12. *and* Ch. 27. Sect. 16. 2 Inſt. 568. State Trials, Vol. 4. fol. 214.

Sect. 4. Alſo it is [i] agreed, That Juſtices in *Eyre*, or of Gaol-Delivery, may order a Jury to be returned immediately for the Trial of a Priſoner arraigned before them. Alſo it is clearly [k] holden by Sir *Edward Coke*, and hath been often [l] adjudged, That Juſtices of *Oyer* and *Terminer*, for the Trial of any Iſſue joined before them, might award a *Venire* returnable the ſame Day on which the Party is arraigned. Alſo it is holden by Sir [m] *Edward Coke*, and hath been [n] adjudged, That Juſtices of the Peace may do the like; but there are very [o] ſtrong Authorities to the contrary, unleſs the Crime amount to [p] Felony, or the Party [q] conſent to be tried immediately.

[i] Keilw. 159 b H. P. C. 256. Crompt Juſt. 152. a. Cro. Ca. 315. 1 Sid. 335 pl. 20. Fitz. Inq. 55. Vide Kely. 7. [k] 2 Inſt. 568. 3 Inſt. 164. [l] Cro. Ca. 340, 583 2 Roll. A.b. 96. pl. 1. H. P. C. 161. *Admitted* 2 Keb. 212, pl. 49 292, pl. 75. 718, pl. 109. 1 Keb. 433. pl. 13.

Sect. 5. *Quære* how far the Law is altered as to theſe Points by 4 & 5 *Will. & M.* 24. and 7 & 8 *W.* 3. 32. which by requiring that Jurors ſhall be ſummoned ſix Days before they are to appear, ſeem to make it neceſſary whenever a [r] *Venire* or particular Precept is required for the Return of a Jury, [s] that there be ſix Days between its *Teſte* and Return.

Sect. 6. It hath been [t] adjudged, That a *Venire* before Juſtices of *Oyer* and *Terminer* returnable at a Day certain is erroneous, unleſs the Seſſions appear to have been [u] adjourned to the ſame Day; becauſe otherwiſe it ſhall not be intended that their Commiſſion continued till ſuch Day, and if it did not, their Authority to try the Iſſue was determined. But it is admitted [x] that ſuch *Venire* may be made returnable at the next Aſſiſes, and then tried by Vertue of [y] 1 *E.* 6. 7.

1 Sid. 334. pl 20. 1 Roll. Abr. 96. pl. 1. Cro. Ca. 340, 583. Cont. Keilw. 159. b. Trial per pais, 26. 2 Roll. Ab. 625. pl. 2. H. P. C. 266. [m] 2 Inſt. 568. 3 Inſt. 164. [n] Cro. Ja. 404. pl. 2. *and in this Book it is ſaid that Common Experience is ſo.* [o] Fitz. Coro. 44. Keilw. 159. b. 1 Jon. 379. pl. 10. S. P. C. 156. a. 1 Keb. 433. pl. 3. Trial per Pais, 25, 26. 2 Keb. 212. pl. 49. Crompt. Juſtice, 152. a. 1 Sid. 99, pl. 2. 335. pl. 20. Cro. Ca. 438, 448. 2 Roll. Abr. 625. L. 1. 3. H. P. C. 256. [p] 1 Sid. 335, pl. 20. *In* Crompt. Juſtice, 150. b. *'Tis ſaid that the Seſſions for the Peace may award Proceſs for the Trial of an Indictment of Felony, the next Day after it is traverſed. Quære if the Party's being in Gaol make no Difference?* Cro. Ca. 340. 2 Roll. Abr. 96. pl. 1. 1 Sid. 335. pl. 20. [q] 1 Keb. 433. pl. 3. 1 Sid. 99, pl. 2. 334 pl. 20, [r] Vide ſupra, Sect. 1. [s] State Trials, Vol. 4. fol. 99, 100. [t] 1 Sid. 348. pl. 15. 2 Keb. 284. pl. 53 292, pl. 75. 718, pl. 109. 854. pl. 6. *And in theſe Books ſuch Error is ſaid not to be helped by the next Aſſiſes happening to fall on the ſame Day.* [u] Vide ſupra, Ch. 5. Sect. 6. 13. [x] 1 Sid. 348 pl 15. 2 Keb 284 pl. 53 718. pl. 109. 854 pl. 6. Cro. Ca. 340. [y] Vide Ch. 5 Sect. 11.

Sect. 7. It hath been [a] adjudged, That the Award of a *Venire* returnable at a certain Day before Juſtices of *Oyer, &c.* needs not expreſsly mention before what Juſtices it ſhall be returnable; for it cannot but be intended that it ought to be before the ſame Court which awards it.

Sect. 8. As to the third Point, *viz.* Where a *Venire* may be joint or ſeveral: It ſeems agreed, That where ſeveral Perſons are arraigned upon the ſame [b] Indictment or [c] Appeal, and ſeverally plead not guilty, it is in the [d] Election of the Proſecutor, *&c.* either to take out [e] joint *Venires* againſt them all, or [f] ſeveral againſt each of them. But in an Appeal, if one plead Not guilty, and the other plead a Releaſe made at *A.* it ſeems [g] that there muſt be ſeveral *Venires*.

Sect. 9. It ſeems generally [h] agreed, That where the ſame Jury is returned on ſuch a Joint Proceſs againſt ſeveral Defendants, if a Juror be challenged by any one Defendant, and the Challenge allowed, and the Juror thereupon [i] drawn, he is by neceſſary Conſequence drawn as to all the other Defendants alſo, becauſe there being but one Panel, the ſame Perſon cannot at the ſame Time be taken from it, and yet continue in it. But where one Jury is jointly returned for the Trial of ſeveral Defendants before Juſtices of Gaol-Delivery, it is [k] certain that they may afterwards ſever the Panel, if they find it expedient, for the Prevention of this Inconvenience. But I do not find [l] that this can be done in any other Caſe. And it ſeems agreed, That after an Appellant hath taken out a joint *Venire* againſt all the Appellees, he cannot [n] afterwards take out ſeveral ones, tho' the firſt be never returned; and the Reaſon ſeems to be becauſe it wou'd amount to a [o] Diſcontinuance.

Sect. 10. As to the fourth Point, *viz.* Where Proceſs may be taken out by the Defendant in Criminal Caſes by *Proviſo.* (*i. e.* with a [p] Clauſe that if two Writs come to the Sheriff he ſhall execute one of them only.) I take it to be agreed, [q] That it may be ſo awarded in any Appeal, whether Capital or not Capital, in the ſame Manner as in other Actions, after the Appellant hath made Default in [r] relation to the very ſame Kind of Proceſs. And therefore if the Appellant, after Iſſue joined, either neglects to take out any [s] *Venire* the ſame Term, *&c.* or takes one out but doth not * get it returned, it ſeems that the Defendant may take one out by *Proviſo, &c.* And in like Manner if the Appellant make the like Default in ſuing out an *Habeas Corpora*, or other ſubſequent Proceſs, the Defendant may ſue out the like Proceſs by *Proviſo.* But where the Defendant hath ſued out any Proceſs by *Proviſo*, there are [t] Authorities that

[a] 29 Ed. 3. 30. b. 31. a. *In* Dy. 315. pl. 99 *the ſame Caſe is taken Notice of, and it is there ſaid, That the* Venire *itſelf needs not ſhew before what Juſtice it is returnable; but this ſeems not to be warranted by the Book at large.* Vide 2 Keb. 855. pl. 6.

[b] H. P. C. 256.

[c] State Trials, Vol. 4. fol 100.

[d] H. P. C. 256. S. P. C. 155. a. 1 Jo. 425. *But* Cro. Eliz. 541. pl. 4. *it is ſaid to be the Courſe to try the Defendants in Appeal by ſeveral* Venires.

[e] S. P. C. 155. a. *it is ſaid, That where there are three Defendants the Plaintiff may join 2 of them in one* Venire, *and take out another againſt the third.*

[f] *See the Books above-cited.* and 1 Jon. 425. and Fitz. Quare impedit, 199. 21 H. 6. 22. pl. 46. [g] *See the Books above-cited. Alſo the ſame is adjudged,* 1 Jon. 425. *where one Appellee was charged with doing the Fact* proditorie, *the others* Felonice. *See* Fitz. Quare impedit, 199. Viſne, pl. 1. Bro. Viſne 27. Vide 11 H. 7. 5 pl. 9. Bro. Diſc. de Proceſs, 62. Fitz. Execut. 114. Niſi prius, 7, 8. [h] S. P. C. 155. a. H. P. C. 256. 9 Ed. 4. 27. pl. 40. Moor, 13. pl. 48. Co. Litt. 156. b. Dyer 246 pl. 70. Plowd. Com. 100. Bro. Challenge, 84. *Parallel Caſe* Co. Litt. 130. b. 4 H. 4. 4 a. Dyer 246. pl. 70. 50 Ed. 3. 1. pl. 1. Fitz. Protection, 21, 126. 3 H. 4. 5. pl. 24. Crompt. Juſt. 113. b. pl. 1. *But this is made a Quære* Dyer 152. pl. 8. *and denied in the ſame Caſe in* Daliſ. 25 pl. 11. [i] *But if no Judgment be given that the Juror who is challenged by one ſhall be drawn, but only that he ſhall ſtand aſide for a Time, it is ſaid that he may try thoſe who do not actually challenge him,* Dyer 120. pl. 8. Cont. Bendloes, 58. pl. 95. [k] Kely. 7. H. P. C. 256. Plow. Com. 100. 9 Ed. 4. 27. pl. 40. Crompt. Juſt. 113. b. pl. 2 [l] Plow. Com. 100. [n] 8 Co. 66. a. S. P. C. 155. Lett. A. 27 H. 6. 4. pl. 28. Fitz. Proceſs, 94. S. P. C. 155. Lett. A. Bro. Venire facias 32. 9 Ed. 4. 27. pl. 40. Fitz. Challenge 56. Vide Fitz. Inqueſt, 59. Executors, 114. [o] Supra Ch. 27. Sect. 96. [p] 8 H. 6. 6. pl. 14. Fitz. Proceſs, 79. Vide 2 Roll. Ab. 666. B. 1. 2. Raſt. Ent 625. pl. 7. 1 H. P. C. 257. S. P. C. 155. Lett. B. Fitz. Proceſs 211. 15 H. 7. 9. pl. 10. Keilw. 176. pl. 10. [r] *See the Books cited to the other Parts of this Section.* 33 H. 6. 14. a. [s] Dyer 215 pl. 51, 52. Cro. Ca. 484. Vide Dyer, 284. pl. 34. 319. pl. 13. 2 Roll Ab. 666. B. 1. 2. 2 Jon. 38. Keilw. 176. pl. 11. * 8 H. 6. 6. pl. 14. Fitz. Proceſs, 79. Bro. Niſi prius, 13. [t] 15 H. 7. 9. pl. 10. 14 H. 7. 7. pl. 16 Fitz. Proceſs, 211. Dyer, 318. pl. 10. H. P. C. 257. Cro. Ca. 484. 2 Roll. Ab. 666. pl. 1, 2, 3, 4. Bro. Octo Tales, 8. S. P. C. 71. Lett. A. 155. Lett. G. Dyer, 284. pl. 34. 193. pl. 28. Cont. Fitz. Proceſs, 68. Dyer 215. pl. 51, 52. 217. pl. 51.

the

the Plaintiff is to ſue out the proper ſubſequent Proceſs upon it in the ſame Manner as if he had ſued out the firſt; and that it is irregular for a Defendant to take out any ſuch ſubſequent Proceſs till the Plaintiff has made a [a] Default in Reſpect of the ſame Kind of Proceſs, except only in ſuch Actions wherein the Defendant is an Actor as well as the Plaintiff, as in [b] Replevin, or [c] Error, or [d] *Quare impedit* againſt the Patron only, or [e] Prohibition, *&c.* in which Actions the Defendant may either take out Proceſs by *Proviſo*, without any Default in the Plaintiff, or [f] may, if he think fit, take it out in the ſame Manner as the Plaintiff, without any Clauſe of *Proviſo*. But it ſeems agreed, That neither in Actions wherein the King is ſole [g] Party, nor in [h] Indictments, there can be any Proceſs taken out by *Proviſo*, becauſe no Laches is imputable to the King. Alſo it hath been [i] queſtioned, whether there can be any ſuch Proceſs in Informations *qui tam*, becauſe the King is in ſome Sort a Party.

As to the fifth Point, *viz.* In what Caſes, and in what Manner a *Tales* is grantable, I ſhall obſerve the following Particulars.

Sect. 11. 1. That if a full Jury appear not in an Appeal whether by Reaſon of the [k] Death of ſome of the Perſons returned, or for any other Cauſe, or if ſo many be [l] challenged and drawn that there do not remain enow to make a Jury; or if after the Jury is charged, one [m] or more of them die, the Appellant [n] may pray a *Tales*, in the ſame Manner as a Plaintiff in other Actions. And ſo alſo may the Appellee, if the Appellant neglect to pray one the ſame [o] Term, *&c.* But it ſeems that a Defendant cannot regularly pray it till there has been a Default in the Plaintiff.

Sect. 12. 2. That in Capital Caſes, a *Tales* may be granted for a larger Number than the firſt Proceſs, as for [p] ſixty, or forty, or any other even [q] Number that the Court thinks proper, in order to prevent the Delay, which may be occaſioned by the Defendant's peremptory Challenges. And in this Reſpect the Law in Reſpect of a *Tales* in Capital Caſes is different from what it is in any other Caſe; it being an allowed Rule, that in all [r] other Caſes the *Tales* muſt be for a leſs Number than the firſt Proceſs.

Sect. 13. 3. That every ſubſequent *Tales*, in Capital as well as in all [s] other Caſes, muſt be for a [t] leſs Number than the former, except the former were quaſhed, in which [u] Caſe the next may be for the ſame Number.

[a] Dyer 215. pl. 53, 52. Bro Niſi prius, 40. 6 Mod. 246.
[b] Dy. 193 pl. 28. 21 H. 6. 22. pl. 2. 16 H. 7. 14. pl. 10. Fitz. Niſi prius, 9. Bro. Niſi prius, 40.
[c] 2 Lev. 5, 6. 2 Saund. 336.
[d] 6 Mod. 246. Fitz. Niſi prius, 6.
[e] Par. Caſe, 2 Roll. Abr. 666. Lett. R. Fitz. Niſi prius, 3.
[f] 2 Lev. 5, 6. 16 H. 7. 14. pl. 10. Bro. Niſi prius 40. 21 H. 6, 22. pl. 2. Bro. octo Tales, 17. 2 Saund 336.
[g] 2 Leon. 110.
[h] 6 Mod. 246, 247. 1 Keb. 495. pl. 184. Cont. 1 Sid. 316.
[i] 2 Leon. 110.
[k] S. P. C. 155. Lett. F. 10 Co. 104 b. H. P. C. 257. 20 Ed. 3. 11. pl. 13.
[l] State Trials, Vol. 1. f 502.
[m] S. P. C. 155. Lett. F. 12 H. 4. 10. a. S. 10 Co. 104. b.
[n] H. P. C. 257. S. P. C. 155. Lett. C. 14 H. 7. 7. pl. 16.
[o] Cro. Ca. *Quære* 2 Rol. Abr. 671. pl. 2. 14 H. 7. 7. pl. 16. 10 Co. 104 b. *See the Books cited to the precedent Section, under the Letter* f. *Yet 'tis ſaid in* Dyer 359. pl. 2. *That if a full Jury do not appear, and the Plaintiff pray a* Diſtringas *without praying any* Tales, *the Court ought to grant it at the Prayer of the Defendant.* Vide 2 Roll. Abr. 671. N.
[p] 14 H. 7. 7. pl. 16. H. P. C. 257. S. P. C. 155. Lett. C. Finch 415. Bro. octo Tales, 6, 8, 19. Keilw. 176. pl. 10. Dyer 213. pl. 43. 1 Bulſt. 121. 15 Ed. 4. 33. pl. 19. 16 Ed. 4 5. pl. 3. 10 Co. 104, b. 105. a.
[q] 10 Co. 105. a. Finch of Law, 414. *But a* Tales de circumſtantibus *may be of any uncertain Number*, 10 Co. 105. a.
[r] 14 H. 7. 7. pl. 16. Finch of Law, 414. 10 Co. 104, b. 105. a. 2 Roll. Abr. 672. Lett. Q. 37 H. 6. 12. pl. 1. Bro. octo Tales, 11. 16. Fitz. Inqueſt, 20, 40. 18 Ed. 4. 6 pl. 31.
[s] Finch of Law, 414. 2 Roll. Abr. 672. Letters Q S. Bro. octo Tales, 15, 16. Bro. attaint, 7. 10 Co. 105. 47 Aſſ. pl. 10. 14 H. 7. 2. pl. 6.
[t] S. P. C. 155. Lett. C. H. P. C. 257. Keilw. 176. pl. 10. 10 Co. 105. a. Fitz. Inqueſt, 40. Lett. C. H. P. C. 257. Fitz. Challenge, 36. 20 H. 6. 38. pl. 2. *it is ſaid, That there may be* 12 Tales, *but this is contrary to all the other Books.*
[u] S. P. C. 155.

Sect. 14. 4. That the quaſhing the Array of the principal Panel doth [a] not quaſh that of the *Tales*, but the Inqueſt ſhall be taken of thoſe returned on the *Tales* if there be enow, and if not, others ſhall be added to them by a new *Tales*. Yet it ſeems [b] agreed, That if all the Perſons returned on a *Habeas Corpora*, be challenged and drawn, there ſhall not be a *Tales* awarded, but a new *Venire facias*; for the Word *Tales* plainly refers to ſome others, to whom the Perſons returned are to be like. Alſo it ſeems agreed, [c] That if the firſt *Habeas Corpora* be quaſhed, the *Habeas Corpora* with a *Tales* cannot but be quaſhed with it, and the Party muſt go on in the ſame Manner, as if the *Venire* had been only returned, and nothing done upon it; for where a Proceſs is quaſhed, all that follows it and depends upon it, ſeems of Courſe to fall with it.

Sect. 15. 5. That it ſeems the ſtronger Opinion, That a *Tales* is not grantable upon the Return of a *Venire*, but only [d] upon the Return of a *Habeas Corpora* or *Diſtringas*, becauſe it appears not before ſuch Return, but that a full Jury may appear.

Sect. 16. 6. That the [e] *Diſtringas*, or [f] *Habeas Corpora*, with a Command to add ſo many more to thoſe ſummoned on the *Venire*, is the firſt Proceſs againſt the *Tales*; but it is [g] ſaid not to be grantable with a *Niſi prius*, without having been firſt returned into the Court.

Sect. 17. 7. That [h] if a Juror be with-drawn after a Trial is commenced whereon a *Tales de Circumſtantibus* was awarded, and afterwards a new *Habeas Corpora* be taken out with a *Tales*, it ſhall appoint ſuch *Tales* to be added to the Jurors returned on the firſt *Venire*, and alſo to thoſe returned on the *Tales de circumſtantibus*; becauſe the Court above will take judicial Notice of what is done at *Niſi prius* being entred on Record.

Sect. 18. 8. That the [i] Statutes which authoriſe Juſtices of *Niſi prius* to award a *Tales de circumſtantibus*, extend [k] as well to all Capital Caſes, whether of Treaſon or Felony, as to others. But it ſeems that ſuch a *Tales* cannot be prayed for the King upon an Indictment, or Criminal Information, without a [l] Warrant from the Attorney General, or an expreſs [m] Aſſignment from the Court before which the Inqueſt is taken. But for the fuller Underſtanding of theſe Matters, not being ſo proper for this Treatiſe, I ſhall refer to the Statutes in the Margin.

Sect. 19. 9. That it hath been [n] queſtioned whether any *Tales* be grantable by Juſtices of *Oyer* and *Terminer*; and it hath been [o] holden, That it is not grantable by Juſtices of Gaol-Delivery: And therefore if a Trial before ſuch Juſtices be put off for Want of a ſufficient Number of Jurors, it ſeems the uſual Practiſe for the Court not to order a *Tales*, but a [p] larger Panel, whereon the former Jurors ſhall be returned in the ſame Order as before, and called to be ſworn as they ſtand, without any more Regard to thoſe who were ſworn before than to the others. Which is the Method likewiſe to be obſerved in the like Caſe, as to the ſwearing of a Jury returned with a *Tales*.

[a] Fitz. Inqueſt, 30. S. P. C. 155. Lett. G. Dyer 245. pl. 64. 10. Co. 104. b. 105. a.

[b] S. P. C. 155. Leet. E. Finch, 414.

[c] 34 H. 6. 20. pl 39. Fitz. Inqueſt, 20.

[d] Cro. Eliz. 502, 503. 27 H. 6. 10. pl. 4 Bro Niſi prius, 1. *and* Octo Tales 1. 34 H. 6. 21. pl. 39. 2 Roll. Abr. 671. O. pl. 2. Cont. Bro. octo Tales, 10. 15 H. 7. 9. pl. 10.

[e] 1 Roll. Ab. 798. pl. 9.

[f] 27 H. 6. 10. pl. 4. Bro. Niſi prius, 1. *and* octo Tales 1.

[g] 27 H. 6. 10. pl. 4. Bro. Niſi prius, 1. *and* Octo Tales 1. 1 H. 5. 11. pl. 22. S. P. C. 157. a.

[h] Cro. Ja. 677.

[i] 35 H. 8. 6. Par. 6, 7, 8. *made perpetual by* 2 & 3 Ed. 6. 32. 4 & 5 Ph. & Ma. 7. 14. El. 9.

[k] Raym. 367. 1 Lev. 223. 1 Keb. 490. pl. 30.

[l] 1 Lev. 223.

[m] *See the Statute of* 14 Eliz. 9.

[n] State Trials, Vol. 4. fol. 179 *to* 182.

[o] State Trials, Vol. 4. fol 179 *to* 182. *Yet there is an Inſtance in* Keilw. 176. pl. 10. *of the* Tales *awarded in an Appeal before ſuch Juſtices. And the like was done* Plow. Com. 100. *upon an Indictment of Murder.*

[p] State Trials, Vol. 4. fol. 179 *to* 182. Yelv. 23.

Sect. 20, As to the ſixth Point, *viz.* Where it is neceſſary to return a Panel into Court, before an Inqueſt can be taken upon it, and where the Priſoner may demand a Copy of it. It is recited by 42 *Ed.* 3 11. *That divers Miſchiefs had happened, becauſe that the Panels of Inqueſts which had been taken before Juſtices by Writ of* Scire facias, *and other Writs, had not been returned before the Seſſions of the Juſtices at the* Niſi prius, *and otherwiſe, ſo that the Parties could not have knowledge of the Names of the Perſons which ſhould paſs in the Inqueſt, whereby divers of the People had been diſherited and oppreſſed, and thereupon it is ordained that no Inqueſt* [c] *but Aſſiſes and Deliverances of Gaols, be taken by Writ of* Niſi prius, *nor in any other Manner, at the Suit of the Great or Small, before the Names of all them that ſhall paſs in the Inqueſt, be returned in the Court.*

[c] *Note that* 6 H. 6. ch. 2. *provides alſo for Aſſiſes,* 3 Inſt. 175.

Sect. 21. It ſeems [f] agreed, That this Statute extends as well to Writs of *Niſi prius* in Criminal Caſes as in Civil, and to [c] Jurors returned upon a *Tales* as well as to thoſe returned upon a Principal Panel.

[f] S.P. C. 156, 157. H. P. C. 258. *Quare, If the Statute extend to Juſtices of* Oyer *and* Terminer, *for it is ſaid to be the Practice for Trials before them for Treaſon to be on the* Venire *and not to award any* Habeas Corpora. St. Trials, Vol. 4. fol. 102.

Sect. 22. But it ſeems [h] that in Trials before Juſtices of Gaol-Delivery the Priſoner has no Right to a Copy of the Panel before the Time of his Trial, except only in Caſes within the Purview of 7 & 8 *W.* 3. 3. which enacts, *That every Perſon indicted and tried for High Treaſon, or Miſpriſion thereof (except it be for counterfeiting the Coin,* &c.) *ſhall have a Copy of the Panel of the Jurors, who are to try him, duly returned by the Sheriff, and delivered unto him two Days at leaſt before he ſhall be tried.*

[h] State Trials, Vol. 2. fol 762. Vol. 3. fol. 4. 866, 867. Vol. 4. fol. 6.

Sect. 23. It hath been [i] adjudged to be ſufficient within the Intent of this Act to deliver to a Priſoner a Copy of a Panel array'd by the Sheriff before it is returned into Court, if the very ſame Panel be afterwards returned.

[i] State Trials, Vol. 4. fol. 101 *to* 104.

CHAP.

CHAP. XLII.

Before what Court the Jury is to be returned.

Sect. 1. AND now I am to conſider before what Court the Proceſs againſt Jurors in Criminal Caſes is returnable: As to which there can be no [a] Doubt but that by the Common Law it is returnable only into the Court wherein the Proſecution was depending.

Sect. 2. But the Statute of [b] *Weſtm.* 2. *Ch.* 30. having ordained that all Pleas in either Bench, which require only an eaſy Examination, ſhall be determined in the Country before the Juſtices of Aſſiſe, by Vertue of the Writ preſcribed by that Statute, commonly called the Writ of *Niſi prius*, it ſeems to have been univerſally agreed, [c] That an iſſue joined in the King's Bench upon an [d] Indictment or [e] Appeal, whether for Treaſon or [f] Felony, or a Crime of an inferior [g] Nature, committed in a different County from that wherein the Court ſits, may be tried in the proper County by Writ of *Niſi prius* by Vertue of the ſaid Statute.

Sect. 3. Yet inaſmuch as the King is not expreſsly named in this Statute, and it is a general Rule, That he ſhall not be bound by a Statute which doth not expreſsly name him; it ſeems to have been generally holden, That where-ever the King is a Party it is irregular to grant a Trial by *Niſi prius* without his [h] ſpecial Warrant, or the [i] Aſſent of his Attorney. But I do not find it denied, [k] but that regularly the Court may grant it in an [l] Appeal in the ſame Manner as in any other Action.

Sect. 4. Having ſhewn already, *Ch.* 7. *Sect.* 17, 18. and *Ch.* 23. *Sect.* 141, the 2d. that Juſtices of *Niſi prius* have Power by 14 *H.* 6. 1. to give Judgment in Felony and Treaſon, and how far they have Power to give Damages in an Appeal, and having alſo ſhewn *Ch.* 25. from *Sect.* 7 *to* 14. in what Caſes they may arraign an Appellee at the Suit of the King, after a Nonſuit of the Party, I ſhall refer to what is there ſaid concerning theſe Matters.

[a] Vide 4 Inſt. 159.

[b] 2 Inſt. 421, 423, 424. Cro. Ca. 349.

[c] 2 Inſt. 424. 4 Inſt. 160. *See the Books cited to the other Parts of this Section.*

[d] Bro. Coro. 231.

[e] 4 Co. 43. pl. 9. 4 Inſt. 160. Dy. 46. pl. 8. 261. pl. 26. 21 H. 7. 34. pl. 35. Raſt. Ent. 47. a. 55. a.

[f] Bro. Coro. 231. 4 Inſt. 160. Raym. 367.

[g] Cro. Ca. 348, 349. 6 Mod. 246, 247.

Vide ſupra, Ch. 7. Sect. 18. Ch. 23. Sect. 141, 201.

[h] Fitz. Niſi prius, 16. 2 Leon. 110. 2 Inſt. 424. F. N. B. 241. Lett. A. Bro. Niſi prius, 16.

[i] 2 Inſt. 424. F. N. B. 241. Lett. A. Crompt. Juriſ. 211. b. 6 Mod. 246, 247. S. P. C. 156. Letter A. H. P. C. 258. *In* Cro. Ca. 348, 349. *In an Indictment of Barretry, which ſeemed to require great Examination, the Court refuſed to grant a Trial by* Niſi prius *at the Motion of the Attorney General, till the King by his Letters, had ſignified his Pleaſure that it ſhould be ſo tried.* Vide 6 Mod. 123.

[k] *But not where the Jury is to be from two Counties,* Dy. 46. pl. 6.

[l] *See the Books cited to the precedent Section under Letter.* e.

CHAP.

CHAP. XLIII.

Of Challenges.

AND now I am to ſhew in what Manner the Jurors returned for the Trial of a Criminal may be challenged, which I ſhall conſider,

1. So far as it relates to all Perſons in general.
2. With Regard to Aliens only.

Sect. 1. As to the Learning of this Kind, ſo far as it relates to all Petſons in general, having premiſed that no Challenge [a] can be taken, either to the Array or to the Polls, till a full Jury have appeared; and that no Juror can be [b] challenged either by the King or Priſoner, without [c] Conſent, after he hath been ſworn, whether on the ſame Day, or (according to the greater Number of [d] Authorities,) on a former, on the ſame Trial, unleſs it be for ſome Cauſe which happened [e] ſince he was ſworn, I ſhall endeavour to ſhew,

1. How Jurors may be challenged on the Part of the King.
2. How on the Part of the Priſoner.

Sect. 2. And firſt, as to ſuch Challenges on the Part of the King: It ſeems [f] agreed, That by the Common Law the King might challenge peremptorily as many as he thought fit, of any Jury returned to try any Cauſe in which he was a Party. But this is remedied by 33 *Ed.* 1. commonly called an Ordinance for Inqueſts, which is enacted as followeth, *Of Inqueſts to be taken before any of the Juſtices, and wherein our Lord the King, is Party, howſoever it be: It is agreed and ordained by the King and all his Counſel, that from henceforth, notwithſtanding it be alledged by them that ſue for the King, that the Jurors of thoſe Inqueſts, or ſome of them be not indifferent for the King, yet ſuch Inqueſts ſhall not remain untaken for that Cauſe; but if they that ſue for the King will challenge any of thoſe Jurors, they ſhall aſſign of their Challenge a Cauſe certain, and the Truth of the ſame Challenge ſhall be inquired of according to the Cuſtom of the Court.*

[a] Hob. 235. [b] Yelv. 23. Cro. Ca. 291. Co. Litt 158. a. 22 Ed. 3. 8. pl. 20. 2 Roll. Abr. 658. pl. 5, 6, 7, 8, 9. 659. pl 4, 5. 661. Lett Q. 12 H. 4. 10. a. Fitz. Challenge, 64. 14 H. 7. 6. pl. 13. Bro. Challenge 73. 9 H. 5. 7. pl. 21. *Abridged* Fitz. Challenge 72. Bro. Challenge, 50. 14 H. 7. 19. pl. 8. *Abridged* Bro. Challenge 75. State Trials, Vol. 3. fol. 379.

Neither can a Challenge be taken to the Array after any of the Jurors are ſworn.

Hob. 235. [c] Cro. Ca. 291. State Trials, Vol. 3. fol. 379. [d] 22 Ed. 3. 8. pl. 20. 2 Roll. Ab. 658. pl. 5, 6, 7, 8. 659 pl. 4, 5. 661. Lett. Q. 12 H. 4. 10. a. 14 H. 7. 6. pl. 14. Bro. Challenge 50, 73, 130. Fitz. Challenge, 143. 28 Aſſ. pl. 44. Yelv. 23. *Yet adjudged, That a Juror after he is ſworn may be peremptorily challenged another Day, tho' not on the ſame wherein he is ſworn,* 32 H. 6. 26. pl. 14. *Abridged* Bro. Challenge, 193. 14 H. 7. 19. pl. 8. *Abridged* Bro. Challenge, 75. S. P. C. 158. 2 Rich. 3. 19. pl. 34. *Abridged* Bro. Challenge, 194. [e] 22 Ed. 3. 8. pl. 20. Yelv. 23. 2 Roll. Abr. 658. pl. 5, 6, 7, 8, 9. Bro. Challenge, 130. 28 Aſſ. pl. 44. Co. Litt. 158. a. 14 H. 7. 6. pl. 14. Bro. Challenge 50, 73, 75. Fitz. Challenge, 64, 72, 143. [f] Co. Litt. 156. b. H. P. C. 259. S. P. C. 162. Lett. A. 2 Roll. Ab. 645. X. pl. 2, 3.

Sect. 3. It seems to be clearly settled [a] at this Day, That this Statute being general, extends as well to all criminal as civil Causes: However if the King challenge a Juror before the Panel is perused, it is [b] agreed that he needs not shew any Cause of his Challenge till the whole Panel be gone thro', and it appear that there will not be a full Jury without the Person so challenged. And if the Defendant, in order to oblige the King to shew Cause, presently challenge *touts paravaile* [c], yet it hath been adjudged that the Defendant shall be first put to shew all his Causes of Challenge, before the King need to shew any.

Sect. 4. As to the second Point, *viz.* How Jurors may be challenged on the Part of the Prisoner: Having premised that a [d] Peer can take no Challenge to any of his Peers; and that where several are tried on a joint [e] *Venire*, a Juror challenged and drawn as to one, cannot but be drawn as to all, I shall farther endeavour to shew,

1. How Jurors may be challenged peremptorily.
2. How they may be challenged for Cause.

As to the first Particular, *viz.* How Jurors may be challenged peremptorily, having premised that the Prisoner must take all such Challenges himself, [f] even in such Cases wherein he may have Counsel, I shall endeavour to shew,

1. In what Cases a peremptory Challenge is allowable.
2. How many Jurors may be so challenged.

Sect. 5. As to the first Particular, I take it to be agreed, That a peremptory Challenge was allowable by the Common Law, in all [g] capital Cases both upon Indictments and [h] Appeals, and also in [i] Misprision of High Treason; but it was enacted by 33 *H.* 8. 23. *Par.* 3. *That it should not be allowed in any Cases of High Treason, nor Misprision of High Treason.* Nor do I know that any Statute hath revived it as to the latter of these; for it is said that the Statute of 1 *Ph. & M.* 10. which by restoring the old Course of the Common Law as to Trials of Treason, has revived [k] such Challenge as to Treason, doth not [l] extend to Misprision of High Treason.

Sect. 6. It hath been anciently [m] adjudged, and is holden both by [n] *Staundforde* and [o] *Coke*, That a Man shall have the same peremptory Challenges on an Issue joined upon collateral Matter alledged in Avoidance of an Outlawry for a capital Crime, as he may on the general Issue: But the contrary is holden by [p] *Hale*, and is said to have been [q] adjudged in the Case of *Okey* and *Barkstead*.

Sect. 7. As to the second Particular, *viz.* How many Jurors may be challenged peremptorily: It seems to have been the settled [r] Rule of the Common Law, where-ever such Challenge was allowed, to suffer the

[a] Moor. 595. pl. 8-9. S. P. C. 162. Lett. A. H. P. C. 259. Co. Litt. 159. [b] *and the Books cited to other Parts of of this Section. Yet peremptory Challenges were taken for the Queen in* Throckmorton's *Trial*, 1 Mar. State Trials Vol. 1. fol. 48.

[b] 1 Ventr. 309, 310. S. P. C. 162. Lett. A. State Trials, Vol. 2. 744. Vol 3. fol. 52. 869. H. P. C. 259.

[c] State Trials Vol. 3. fol. 52. Raym. 473, 474. *See* State Trials, Vol. 3. f. 4. Vol. 4. f. 177, 407.

[d] Rushw. Collections, 2 V. 1. f. 94. Moor 621, 622. Co. Litt. 156. b. State Trials, Vol. 1. fol. 164, 265. Trial per pais Ch. 9.

[e] Supra, Ch. 41. Sect. 9.

[f] State Trials, Vol. 4. f. 105. Vol. 1. fol. 601. V. 2. fol. 743, 744.

[g] Co. Litt. 156. b. Moor 12, pl. 46.

[h] Moor, 12. pl. 46. Bendl. 42. pl. 77. 9 H. 5. 7. pl. 21.

Abridged Fitz. Challenge 72. Bro. Challenge, 50. 14 H. 7 7. pl. 16. Bro. Challenge, 74, 75, 211. 3 H. 7. 2 pl. 5. [i] 3 Inst. 27. *But in no other Case that is not Capital.* State Trials, Vol. 2. fol. 254. [k] 3 Inst. 227. S. P. C. 157 Lett B 158. 1 And. 107, 108. Co. Litt. 156. b. State Trials, Vol. 2. fol. 764, *&c. But this is made a Quære* Savil, 57. [l] Supra, Ch 25. Sect. 145. *Yet* 3 Inst. 27. a. *it is said that for Misprision of Treason one may peremptorily challenge* 35. [m] Fitz. Challenge, 153, 165. [n] S. P. C. 163 Lett. A. *Yet the same Point is made a Quære*, S. P. C. 158. [o] Co. Litt. 157. b. [p] H PC. 259. [q] 1 Lev. 61. *But the other Books which report the same Case take no Notice of this Point.* 1 Sid. 72. Kely. 13. [r] Co. Litt. 156. b. Crompt. Just. 114. pl. 4. 9 H. 5. 7. pl. 21. 14 H. 7. 7. pl. 16. Bro. Challenge, 70, 74, 75, 217. 19 Ed. 4. 33. b. 3 H. 7. 2. pl. 5. *Abridged* Bro. Challenge 211. 17 Ass. pl. 6. 17 Ed. 3. 23 pl. 8 *Abridged* Bro. Challenge 105. Trial per pais, Ch 9. S. P. C. 157, b. 158. *See the Books cited*, Ch. 30. Sect 2. Lamb. B. 4. Ch. 14. *says That it was doubtful at Common Law how many might be challenged.*

Priſoner to challenge as many as he thought fit under the Number of three full Juries, *i. e.* not amounting to more than thirty-five. But if a Criminal challenge more than that Number, [a] it ſeems the more prevailing Opinion that he is to be dealt with as one that ſtands Mute.

Sect. 8. It is enacted by 22 *H.* 8. 14. *Par.* 7. made perpetual by 32 *H.* 8. 3. *That no Perſon arraigned for any Petit Treaſon, Murder or Felony, be admitted to any peremptory Challenge above the Number of twenty.* But it ſeems [b] agreed, That 1 *&* 2 *Ph. & Ma.* 10. which reſtores the Courſe of the Common Law as to Trials of Treaſon, has revived the old Challenge of 35 in Trials of Petit Treaſon.

Sect. 9. It ſeems to have been holden by Sir [c] *Edward Coke*, That he who challenges more than twenty upon an Arraignment of Felony, ſince the above-mentioned Statute of 22 *H.* 8. ſhall [d] neither forfeit his Goods, nor have Judgment of Death, nor of *pain fort & dure*, but ſhall only be over-ruled as to his Challenges ſo far as they exceed twenty, and put upon his Trial. But this ſeems to have been doubted by Sir *Matthew* [e] *Hale*, and the contrary is holden by [f] *Crompton*, and ſeems more agreeable to the moſt natural Conſtruction of 22 *H.* 8. which ſeems to have intended no Alteration as to the Nature or Effect of peremptory Challenges, but only as to their Number. To which may be added, That nothing is more Common than for [g] ſubſequent Statutes which take from Felons the the Benefit of the Clergy, [h] expreſsly to exclude thoſe who challenge more than twenty, which would be needleſs if their Challenge were only to be over-ruled, and did not ſubject them to Judgment of [i] Death, *&c.*

Sect. 10. As to the ſecond Particular, *viz.* How Jurors may be challenged for Cauſe, having premiſed that it is a [k] general Rule, That where-ever [l] the King is a Party, as he is in every [m] Indictment, and in ſome Sort alſo in [n] Appeals of Felony, he who takes a Challenge for Cauſe muſt ſhew it preſently, and ſhall not have Time till the Panel is peruſed, as the King ſhall where he takes a Challenge, as hath been more fully ſhewn, *Sect.* 3. and having alſo farther premiſed that after a Priſoner hath challenged a Juror for Cauſe, and his Cauſe hath been diſallowed, or found againſt him, he may [o] challenge the ſame Juror peremptorily, before he is [p] ſworn, I ſhall endeavour to ſhew,

1. What ſhall be a good Challenge of a Juror, in Reſpect of his Honour or Inſufficiency.
2. What in Reſpect of his Unindifferency.

And firſt as to the Challenge of a Juror for his Honour or Inſufficiency; having premiſed that it is agreed to be a good Challenge of this Kind that a Juror is an [q] Alien, [r] Minor, or [s] Villain, I ſhall more fully endeavour to ſhew,

[a] Supra, Ch. 30. Sect. 2.

[b] Bro. Challenge, 217. H. P. C. 260. 3 Inſt. 227. Vide ſupra, Sect. 5. *and* Ch. 25. Sect. 134, 146. S. P. C. 158. a. Co. Litt. 156. b.

[c] 3 Inſt. 227.

[d] Vide Ch. 30. Sect. 19. Staund. Prer. 46. a.

[e] H. P. C. 260.

[f] Crompton's Juſt 114 pl. 4.

[g] Supra, Ch. 33. Sect. 32, 45, 48, 59, 64, 66, 69, *&c.*

[h] Vide ſupra, Ch. 33. Sect. 27, 36. 11 Co. 31, a. 32, a. 35. b. S. P. C. 126. Lett. A.

[i] Vide Ch. 33. Sect. 20.

[k] Co. Litt. 158. a. Fitz. Challenge 128. State Trials, Vol 3. f. 235. S. P. C. 162. Letter C. 2 Roll. Abr. 659. pl 6, 7, 8. 38 Aſſ. pl 22. 1 Sid. 244. Cont. 19 Aſſ. pl. 6. *Abridged* Bro. Challenge, 107.

[l] *Except in Inqueſts*, Fitz. Challenge, 105, 107. 2 Roll. Abr. 659. pl. 9. 660 N. 2.

[m] *That Cauſe muſt be ſhewn preſently on Indictments.* Co. Litt. 158. a. 1 Sid. 244. 1 H. 5. pl. 1. *Abridged* Fitz. Challenge, 70.

[n] *That Cauſe muſt be ſhewn preſently in Appeals.* Co. Litt. 158. a. *This is left a Quære* S. P. C. 162. Lett. D.

[o] Co. Litt 158. a. 37 H. 6. 8 pl. 17, *Abridged* Fitz Challenge, 48. Bro. Challenge, 86. Cont. 10 H. 4, 9 pl. 7. *Abridged* Fitz. Challenge, 180.

[p] Vide ſupra, Sect. 1.

[q] Co. Litt. 156. b. Theloal B. 1. ch. 6. Sect. 14. 14 H. 4 19. pl. 23. Bro. Challenge, 48. Fitz. Challenge, 91. 2 Roll. Abr. 656. pl. 2. Calvin's Caſe, 18. b.

[r] Co. Litt. 157 b. 172. b. Litt. Sect. 259.

[s] 2 Roll. Abr. 657 pl. 1. Co. Litt. 156. b. 9 Ed 4. 16. pl. 16. 26 Aſſ. pl. 28. F. Challenge 135. Bro. Challenge. 64, 118. *But the contrary is holden in the Year-Book of* 10 H. 7. 20. *abridged* Bro. Challenge, 220. *and a Quære by the Reporter and* Brook.

1. Where Peerage is a good Cauſe of Challenge.
2. Where the Want of Freehold.
3. Where Infamy.
4. Whether old Age, Sickneſs, or Non-Reſidence in the County be in any Caſe a good Cauſe of Challenge.

Sect. 11. As to the firſt Particular, *viz.* Where Peerage is a good Cauſe of Challenge, it is [a] agreed, That if a Peer be returned on a Jury and bring a Writ of Privilege, he ſhall be diſcharged. Alſo it ſeems to have been [b] holden, That even without ſuch a Writ he may either challenge himſelf, or be challenged by the Party. *Quære.*

Sect. 12. As to the ſecond Particular, *viz.* Where the Want of Freehold is a good Cauſe of Challenge: It ſeems to be admitted by the Statute of 21 E. 1. *de his qui ponendi ſunt in Aſſiſis*, and alſo by the Regiſter, That at the Common Law there was no [c] neceſſity that Jurors ſhou'd have any Freehold as to Inqueſts before Juſtices in *Eyre*, or in Cities or Burghs, as hath been more fully ſhewn, *Chap.* 25. *Sect.* 20. Alſo it ſeems [d] agreed, That the Common Law doth not require that a Juror ſhould in any Caſe have a Freehold of any certain Value; and upon this Ground it hath been adjudged, That a Freehold worth but [e] 20*s.* or [f] 5 *s.* or even a [g] Penny, is ſtill a ſufficient Qualification for a Juror in ſuch Caſes as are not within the Statutes which require a Freehold of a greater Value. Alſo it hath been [h] adjudged, That the Common Law did not require that a Juror ſhould in any Caſe have any Freehold. But this is not only contrary to what ſeems implied by all the Authorities above-cited, which in ſaying that the Common Law did not require a Freehold of any certain Value, plainly ſeem to ſuppoſe that it required ſome Freehold, but hath been alſo contradicted by many expreſs [i] Authorities; agreeably to which it ſeems to be [k] ſettled at this Day, That the Want of Freehold is a good Challenge of a Juror in all Caſes not otherwiſe provided for by [l] Statute, and conſequently in a Trial for High Treaſon in *London* as well as in any other County.

Sect. 13. But it ſeems agreed, That where-ever the Letter of the Common or Statute Law require that a Juror ſhould have a Freehold, the Meaning is fully ſatisfied, by his having the [m] Uſe of a Freehold; and that it is not material whether he have it in his own or his [n] Wife's Right, or whether it be [o] Abſolute or upon Condition, or an Eſtate of Inheritance, or only [p] for Term of one's own or another's Life, ſo that it be in the ſame [q] County, wherein the Suit is brought, and actually continue in the Juror [r] till the Time when he is ſworn.

[a] 48 Aſſ. pl. 6. 48 Ed. 3. 32. pl. 18. Bro. Challenge, 18, 37, 209. Dy. 314. pl. 98. 35 H. 6. 46. pl. 8. Moor, 767. Regiſt. 179. F. N. B. 165. E. 166.

[b] 22 E. 3. 18. pl. 75. Fitz. Challenge, 119. 2 Roll Abr. 646. Y. 1, 2. *but his Notes are not warranted by the Books at large.* Co. Litt. 157. b. 9 Co. 49. 27 H. 8. 22. pl. 18. Cont. 35 H. 6. 46. pl. 8. Bro. Challenge, 8. Finch of Law 506. 6 Co. 53. a. Fitz. Challenge, 44. 1 Jon. 153. F. N. B. 166.

[c] Vide Raym. 485, 486. 1 Vent. 366. Infra, Sect. 21.

[d] Keilw. 46. pl. 2 54, pl. 19. 92 pl. 5. Cro. E. 413.

See the Citations to the next three Letters, and Litt. Sect. 464 *and* 2 Rol. Abr. 647, 648. [e] 10 H. 6. 7. pl. 24. *Abridged* Fitz. Challenge, 29. Bro. Challenge, 189. 19 H. 6, 9. pl. 21. *Abridged* Fitz. Challenge, 32. Bro. Challenge, 60. 2 H. 7, 13. pl. 17. Bro. Challenge, 152. 10 H. 6. 18. pl. 59. Bro. Challenge, 192. [f] 3 H. 4, 4 pl. 14. *Abridged* Fitz. Challenge, 78. Bro. Chall. 32. [g] Keilw. 46. pl. 2. [h] 28 Aſſ. pl. 15. *Abridged* Bro. Challenge, 106. 10 H. 7. 13. pl. 7. State Trials, Vol. 3. f. 135 *to* 140. Vide 16 H. 7. 14. pl. 10. 7 H. 6. 44. pl. 23. *Abridged* Fitz. Challenge, 24. Bro. Challenge, 57. *It ſeems to be holden that by Common Law it is a Challenge only to the Favour.* [i] Cro. Eliz. 413. pl. 4. Trial per pais, ch. 9. 3 H. 4. 4. pl. 14. *Abridged* Fitz. Challenge, 78. Bro. Challenge, 32. 4 H. 4. 1. pl. 2. Vide Keilw. 54. pl. 14. Co. Litt 156. b. 157. a. 2 Roll. Abr. 647. pl. 9, 10. 7 H. 4. 1. pl. 4. *Abridged* Bro. Challenge 34. Fitz. Challenge, 58. 21 H. 7. 29. pl. 10. *Abridged* Bro. Challenge. 90. 10 H. 7, 11. pl. 30. *It ſeems taken for granted that Iſſues in all Caſes are to be returned upon Jurors, by which it ſeems to be implied that they ought to have Land,* &c. [k] State Trials, Vol. 3. 869. Vol. 4. fol. 874. [l] Vide infra, Sect. 19, *&c.* [m] Keilw. 46, pl. 2 92. pl. 5. Dyer 9. pl. 26. Fitz. Challenge 27. 13 H. 7, 7. b. 5 Ed. 4, 7. pl. 15. Bro. Challenge, 165. Co. Litt. 272. Plow. Com. 58. a. 15 H. 7. 13. b. S. P. C. 160. Lett. b. Bro. Jurors, 14. [n] Fitz. Challenge 27. 9 H. 7. 1. pl. 2. Bro. Challenge, 157. 12 H. 7. 4 pl. 2. Bro Challenge 160. Co. Litt. 156. b. [o] Co. Litt. 156. b. Keilw. 167, 168. 2 Roll. Abr. 648. pl. 20. Cont. 7 H. 4. 1. pl. 4. Fitz. Challenge, 158. *But* Bro. *in abridging this Caſe in Title* Challenge, 34. *ſays* quod mirum. [p] 9 H. 7. 1. pl. 2. 12 H. 7. 4. pl. 2. Bro. Challenge, 160. Co. Litt. 156. b. Bro. Challenge, 157. *See* F. N. B. 14. Lett. e. 166. Lett. f. [q] 9 H. 7. 1. pl. 2. Bro. Challenge, 157. Co. Litt. 157. a. Raſt. Ent. 118. b. 19 H. 6. 9 pl. 21. [r] 12 H. 7. 4. pl. 2. Bro. Challenge. 160. Co. Litt. 157. a. 7 H. 4. 1. pl. 4. *Abridged*, Fitz. Challenge, 158.

Sect.

Sect. 14. It is enacted by the [a] Statutes of *Weſtminſter*, 2. 38. and 21 *Ed.* 1. *de his qui ponendi ſunt in Aſſiſis*, that none ſhall be put in Aſſiſes or Juries, except in Cities, Burghs, or trading Towns, who have not Tenements to the yearly Value of 40 *s. &c.* But it ſeems to have been [*] generally agreed that a Juror can neither be challenged by the Parties for being returned contrary to theſe Acts, nor alledge ſuch Matter himſelf for his Diſcharge, but muſt take his Remedy by Action againſt the Sheriff, or by Writ of Privilege for his Diſcharge.

Sect. 15. It is farther enacted by 2 *H.* 5. 3. *That no Perſon ſhall be admitted to paſs in any Inqueſt upon Trial of the Death of a Man, nor in any Inqueſt betwixt Party or Party in Plea real, nor in Plea perſonal, whereof the Debt or the Damage declared amount to forty Marks, if the ſame Perſon have not Lands or Tenements of the yearly Value of forty Shillings, above all Charges of the ſame; ſo that it be challenged by the Party, that any ſuch Perſon ſo impanelled in the ſame Caſes, hath not Lands or Tenements of the yearly Value of forty Shillings above the Charges as afore is ſaid.*

Sect. 16. It hath been [c] adjudged, That this Statute extends as well to a Collateral Iſſue, as to the General one, but not to an Indictment or Information for a Crime not [d] Capital, for the Words are, *Upon Trial of the Death of a Man, nor in any Inqueſt between Party and Party in Plea real or Perſonal*, &c.

Sect. 17. It ſeems [e] agreed, That a *Ceſtuy que uſe* of any Freehold in the ſame County, of the yearly Value of 40 *s.* is a good Juror within this Statute. And ſome have [f] holden, That the Law is the ſame as to a Feoffee of ſuch Land in Truſt for another, or a [g] Remainder Man of a State of Freehold expectant on a Leaſe for Years. But this ſeems not to be maintainable, becauſe the Statute in requiring that a Juror ſhall have Lands of the yearly Value of 40 *s.* above all Charges, plainly ſeems to intend that he ought to have Lands of the clear [h] Income whereof at the Time he can expend ſo much. But a Man cannot expend any Thing out of Lands whereof he is infeoffed to the Uſe of another, or wherein he has only a dry Remainder.

Sect. 18. It hath beeen [i] adjudged, That this Statute is repealed as to Treaſons by 1 [k] *& 2 Ph. & Ma.* 10. which enacts that all Trials for Treaſon ſhall be according to the Common Law.

Sect. 19. It is recited by 23 *H.* 8. 13. *That Trials in Murders and Felonies in Cities, Boroughs, and Towns corporate within this Realm having Authority to proceed in the Deliverance of ſuch Offenders, had been oftentimes deferred and delayed, by Reaſon of Challenge of ſuch Offenders, for lack of Sufficiency of Freehold, to the great hindrance of Juſtice.* And thereupon it is enacted, *That every Perſon and Perſons being the King's natural Subject born, which either by the Name of a Citizen, or of a Freeman, or any other Name, doth enjoy and uſe the Liberties and Privileges of any City, Borough or Town corporate where he dwelleth or maketh his Abode, being worth in movable Goods and Subſtance to the clear Value of forty Pounds, be admitted in Trial of Murders and Felonies in every Seſſions and Gaol-Delivery, to be kept and holden in and for the Liberty of ſuch Cities, Boroughs, and Towns Corporate, albeit they have no Freehold; any Act, Statute, Uſe, Cuſtom or Ordinance to the contrary hereof notwithſtanding.*

Sect. 20. *Provided that this Act no way extend to any Knight or Eſquire, dwelling, abiding, or reſorting in or to any ſuch City*, &c.

[a] Vide ſupra, Ch. 25. Sect. 29, 20. 21.

[*] 2 Inſt. 448. 28 Aſſ. pl. 15. *Abridg'd* Bro. Challenge, 106. 3 H. 4. 4 pl. 14. *Abridged* Bro. Challenge 32. Fitz. Challenge, 78. F. N. B. 166, State Trials, Vol. 2. fol. 744. *But* 38 Aſſ. pl. 19. *is contrary.*

[c] Keilw. 92. pl. 5. 16 H. 7. 14. pl. 10. 2 Rol. Abr. 647, 648.

[d] Cro. Eliz. 413. pl. 4. Raym. 485, 486.

[e] Vide ſupra, Sect. 13.

[f] Keilw. 92. pl. 5. *and* Bro. Challenge, 202. Jurors, 14. *in an Abridgment of the Year-Book of* 15 H. 7. 13. pl. 1. *but I do not find this Point in the Book at large.*

[g] Keilw. 168. pl. 2.

[h] Vide Keil. 92. a. 18 Ed. 4, 13. pl. 8. 19 H. 6. 9. pl. 21. Fitz. Challenge, 32. 36 H. 6, 23. pl. 16. 2 Roll. Abr. 647, pl. 11, 648, pl. 28, 649 pl. 29.

[i] State Trials, Vol. 3. f. 135 *to* 140.

[k] Vide ch. 25. Sect. 134, 144, 145, 146.

Sect. 21. Alſo ſpecial Proviſion is made by 11 *H.* 7. 21. and 4 *H.* 8. 3. for Jurors in *London* in real and perſonal Actions above the Value of forty Marks, for which I ſhall refer to the Statutes at Large.

Sect. 22. It is enacted by 4 *&* 5 *Will. & M.* 24. *That all Jurors (other than Strangers upon Trials* per medietatem linguæ) *who are to be returned for Trials of Iſſues joined, in any of the Courts of King's Bench, Common Pleas or Exchequer, or before Juſtices of Aſſiſe or* Niſi prius, Oyer *and* Terminer, *Gaol-Delivery, or General Quarter-Seſſions of the Peace in any County of this Realm of* England, *ſhall every of them have in their own Name, or in Truſt for them within the ſame County, ten Pounds by the Year at leaſt above Repriſes, of Freehold or Copyhold Lands or Tenements, or of Lands or Tenements of ancient* * *Demeſne, or in Rents, or in all or any of the ſaid Lands, Tenements, or Rents, in Fee-ſimple, Fee-tail, or for the Life of themſelves, or ſome other Perſon; and that in every County in* Wales *every ſuch Juror ſhall have in the ſame County ſix Pounds by the Year at leaſt, in Manner aforeſaid above Repriſes.*

[a] But by the Common Law a Freehold in Ancient Demeſne was not ſufficient. 9 H. 7, 1. pl. 2. Bro. Challenge, 157. Co. Litt. 156. b.

Sect. 23. But it is provided *that it ſhall be lawful to return any Perſon on a* Tales *in* England, *who ſhall have five Pounds by the Year, or in* Wales, *who ſhall have three Pounds by the Year, in Manner aforeſaid.*

Sect. 24. Alſo there is a Saving to all [b] Cities, Boroughs, and Towns Corporate, of their ancient Uſage of returning Jurors of ſuch Eſtate, and in ſuch Manner as before had been uſed and accuſtomed. But there is no expreſs Saving of any Trial contrary to the Purview of this Statute and made good by ſome other; and therefore it may be argued that the Trial of Felonies in Towns by Jurors worth 40 *l.* in Goods by Vertue of the above-cited Statute of 23 *H.* 8. is no longer lawful, it not being a Trial by Uſage, but by Statute. Yet ſeeing 4 *&* 5 *Gul. & Mar.* ſeems plainly to have a View to Trials in Counties only, and the Statute of 16 *&* 17 *Ca.* 2, 3. which is penned almoſt in the very ſame Words, was taken [c] no way to alter the former Method of Trials in Towns, leſt it ſhould cauſe a Failer of Juſtice; and it being generally impracticable to get a ſufficient Number of ſuch Freeholders as the Statute requires in Towns, it ſeems a reaſonable Conſtruction of 4 *&* 5 *W. & M.* That the Trial by 23 *H.* 8. ſtill continues lawful as before. But it hath been [d] agreed, That for Trials in *London* for High Treaſon, every Juror ought to have ſuch Freehold or Copyhold as is required by 4 *&* 5 *Wil. & Ma.*

[b] Vide ſupra, Sect. 12. *and there is the like Exception in* 27 Eliz. 6. Par. 7. *and in* 16 *&* 17 Ca. 2, 3. Par. 4.

[c] 1 Vent. 366.

[d] State Trials, Vol. 4. f. 186. *and in* Francia's *Trial.*

Sect. 25. As to the third Particular, *viz.* Where Infamy is a good Cauſe of Challenge, it ſeems that it is a good Challenge of a Juror that he is [e] outlawed, or that he hath been [f] adjudged to any corporal Puniſhment whereby he becomes infamous, or that he hath been convicted of Treaſon, or [g] Felony, or [h] Perjury, or [i] Conſpiracy, or of [k] Forgery on 5 *Eliz.* 14. or attainted in an [l] Attaint for giving a falſe Verdict. And it hath been [m] holden that ſuch Exceptions are not ſalved by a Par-

[e] Co. Litt. 158. a. 21 H. 6, 30. pl. 17. 11 H. 4, 41. pl. 8. Bro. Indictment 2. 2 Rol. Abr. 657. pl. 3. Bro. Challenge, 64. Fitz Proceſs, 208. Cro. Ca 134. Trials per pais, ch. 9.

[f] Co Litt. 6, b. 156. a. Trials per pais ch. 9.

[g] Co. Litt 6 b. 158. a. 2 Bulſt. 154 State Trials Vol. 2. fol. 521 *to* 524. Trials per pais, ch. 9. Cont. 1 Lev. 263.

[h] Bract. Lib. 4 cap. 19. Sect. 2. Fleta lib. 4. cap 8. Sect. 2. Trials per pais, ch. 9.

[i] *See* B. 1. ch. 72. Sect. 9. Co. Litt. 6. b. 158. a. *it ſeems to be holden, That the Conviction for Conſpiracy ought to be at the King's Suit. But* 33 H. 6. 55. pl. 45. Bro. Challenge, 15. Fitz. Challenge, 41. *make no ſuch Diſtinction.*

[k] C. Litt. 6 b *and the Reaſon ſeems to be becauſe the Statute is expreſs that the Offender ſhall be ſet on the Pillory,* &c. *but it was adjudged,* 33 H 6. 55. pl. 45. *Abridged* Fitz. Challenge, 41. Bro. Challenge 15. 2 Roll. Abr. 649. pl. 5. *That a Conviction on* 1 H 5. 3. *was not a good Challenge to a Juror, becauſe it was not a Conviction on an Action at the Common Law.* Vide 44 Ed. 3. 39. pl. 39. Fitz. decies tantum, 11, 12.

[l] *See the Authorities under the precedent Letter.*

[m] State Trials, Vol. 2. f. 521 *to* 524. 2 Bulſt. 154 Vide ſup. ch. 37. S. 48 *to* 53.

don. And it was anciently [a] holden that Excommunication was alſo a good Challenge. Yet it [b] ſeems that none of the above-cited Challenges are principal ones, but only to the Favour, unleſs the Record of the Outlawry, Judgment or Conviction be produced, if it be a Record of another Court, or the Term, *&c.* be ſhewn, if it be a Record of the ſame Court.

Sect. 26. As to the fourth Particular, *viz.* Whether old Age, or Sickneſs, or Non-reſidence in the County be in any Caſe a good Cauſe of Challenge of a Juror, I take it to be agreed, That notwithſtanding the [c] Statute of *Weſtm.* 2. 38. be expreſs that neither old Men above the Age of Seventy Years, nor Perſons perpetually Sick, nor thoſe who are infirm at the Time of their Summons, nor thoſe who do not reſide in the County, ſhall be put in Juries, or in the leſſer Aſſiſes; and therefore ſuch Perſons may ſue out a Writ of [d] Privilege for their Diſcharge, grounded on this Statute; yet if they be [e] actually returned and appear, they can neither be challenged by the Party, nor excuſe themſelves from not ſerving if there be not enow without them.

Sect. 27. As to the ſecond Point, *viz.* What ſhall be a good Challenge of a Juror in Reſpect of his Unindifferency: It is expreſsly enacted by 25 *Ed.* 3. *ch.* 3. which ſeems to have been made in [f] Affirmance of the Common Law, *That no Indictor ſhall be put in Inqueſts upon Deliverance of the Indictees of Felonies or* [g] *Treſpaſs, if he be challenged for that ſame Cauſe by him which is ſo indicted.* And this Exception againſt a Juror that he hath found an Indictment againſt the Party for the ſame Cauſe, hath been adjudged good, not only upon the Trial of [h] ſuch Indictment, but alſo upon the Trial of another Indictment or Action, [i] wherein the ſame Matter is either in Queſtion, or happens to be material, tho' not directly in Iſſue.

Sect. 28. It hath been allowed a good Cauſe of Challenge on the Part of the Priſoner, That the Juror [k] hath a Claim to the Forfeiture, which ſhall be cauſed by the Party's Attainder or Conviction; or that he hath declared his [l] Opinion before-hand that the Party is guilty, or will be hanged, or the like. Yet it hath been [m] adjudged that if it ſhall appear that the Juror made ſuch Declaration from his Knowledge of the Cauſe, and not out of any Ill-will to the Party, it is no Cauſe of Challenge.

Sect. 29. But it hath been [n] adjudged to be no good Cauſe of Challenge, that the Juror hath found others guilty on the ſame Indictment; for the Indictment is in Judgment of Law ſeveral againſt each Defendant, for every one muſt be convicted by particular Evidence againſt himſelf.

Sect. 30. It hath been [o] ruled to be a good Challenge of a Juror, on the Part of the King, that he hath given his Dogs the Names of the King's Witneſſes.

[a] Co. Litt. 158.
[b] Co. Litt. 157. b. 33 H. 6. 55. pl. 45. 43 Aſſ. pl. 46. 8 H. 5. 11. a. 21 Ed. 4. 74. b. pl. 5.
[c] Roll. Abr. 650, pl. 11. 649 pl. 13. 658. Lett. K. 33 H. 6. 1. pl. 1. Bro. Challenge, 15, 147.
[d] 2 Inſt. 446, 447, 448. F. N. B. 165, b. 166. D. Regiſter 179, 180.
[e] State Trials, Vol. 2. f. 744. 2 Inſt. 448.
[f] 12 Aſſ. pl. 36. 19 Aſſ. pl. 6. Bro. Challenge, 101, 107. S. P. C. 158. Lett. B.
[g] *Yet in* 7 Ed. 4, 4. pl. 11. *Abridged* Bro. Challenge, 166. Fitz. Challenge, 53 *its is holden to be no principal Challenge in Treſpaſs.*
[h] State Trials, Vol. 2. fol. 379. Vol. 4. fol. 186. *In the Year-Book of* 40 Aſſ. pl. 10. *Abridged* Bro. Challenge, 142. *an Indictor being returned in the Petit Jury and giving a Verdict, was fined*
[i] 8 H. 4. 2. pl. 4. Challenge, 42. Fitz Challenge, 79. Co. Litt. 157. b. 1 Sid. 244. 2 Roll. Ab. 649. pl. 9. *becauſe he did not challenge himſelf.* *Yet* 27 Aſſ. pl. 13. *Abridged* Bro. Challenge, 120. *and* Fitz. Challenge, 137. *'tis not allowed to be a principal Challenge even upon the Trial of the ſame Indictment.*
[k] State Trials Vol. 1. fol. 502. *Abridged* Bro. Challenge, 42.
[l] 21 H. 7. 29. pl. 10. Bro. Challenge, 90. State Trials, Vol. 4. fol. 184, 185. *and ruled that the Priſoner ſhall not examine a Juror concerning ſuch Matter on a* voier dire, *becauſe it ſounds in Reproach.* Vide 49 Ed. 3. 1. pl. 2. *Abridged* Bro. Challenge 55. Fitz. Challenge, 22. 20 H. 6. 40. 2 Roll. Abr. 657. Lett. I. Vide 49 Ed. 3, 1. pl. 2. *Abridged,* Bro. Challenge. 25. Fitz. Challenge, 100.
[m] 7 H. 7, 25. pl. 8. *Abridged* Bro. Trials, Vol. 2. 738.
[n] Kely. 9. State Trials, Vol. 4. fol. 141, 175.
[o] State

Sect.

Sect. 31. It seems to be [a] settled, That where the King is a Party he may take either a principal Challenge, or to the Favour.

Sect. 32. It is [b] said, That the Subject cannot take a Challenge for the Favour against the King, because every one is bound by his Allegiance to favour the King. But if [c] no more be meant by these Books, than that such a Challenge is not good without shewing some actual Partiality in such Sheriff or Juror, or some particular Cause in Respect whereof the King may influence them, it seems not clearly settled how the King in this Respect hath a greater [d] Privilege than the Subject, which yet it seems agreed [e] that he hath.

Sect. 33. It hath been [f] said to be no principal Challenge where the King is a Party, that a Juror is of the King's Livery, or his immediate Tenant; but it is said that a Challenge for such Cause ought to conclude to the [g] Favour. But these Matters seeming to be unsettled, I shall leave them to be farther considered by others.

For other Matters relating to Challenges, being not so proper for this Treatise, I shall refer to the [h] Books which more particularly treat of them.

Sect. 34. And now I am in the second Place to consider the Learning of Challenges, so far as it particularly relates to Aliens; as to whom it is enacted by 28 *Ed.* 3. 13. *Par.* 2. *That in all Manner of Inquests and Proofs, which be to be taken or made amongst Aliens and Denizens, be they Merchants or* [i] *other, as well before the Mayor of the Staple as before any other Justices or Ministers, altho' the King be Party, the one half of the Inquest or Proof shall be Denizens, and the other half of Aliens, if so many Aliens and Foreigners be in the Town or Place where such Inquest or Proof is to be taken, that be not Parties, nor with the Parties in Contracts, Pleas, or other Quarrels, whereof such Inquests or Proofs ought to be taken: And if there be not so many Aliens, then shall be put in such Inquests or Proofs, as many Aliens as shall be found in the same Towns or Places which be not thereto Parties, nor with the Parties, as afore is said, and the Remnant of Denizens, which be good Men, and not suspicious to the one Party nor to the other.*

Sect. 35. It is declared by 9 *H.* 6. 29. that the above recited Statute of 2 *H.* 5. which requires that Jurors in certain Cases shall have Tenements to the yearly Value of 40*s.* *shall be no wise prejudicial to this Statute of* 28 *Ed.* 3. *nor extend itself but only to the Inquests to be taken between Denizen and Denizen,* Also it seems agreed [k] that the subsequent Statutes which require that Jurors shall have Tenements to a greater Value no way repeal the said Statute of 28 *E.* 3. Yet it seems [l] that the *English* Half of the Jury ought to have Tenements to the same Value as in other Cases. And it hath been [m] adjudged, that the Words *quorum quilibet habeat quatuor libratas terræ, &c.* shall be applied to the *English* only.

Sect. 36. It seems * agreed, That there is no need that any of those who find an Indictment against an Alien should be Aliens.

[a] Co. Litt. 156. a. 4 H. 7, 8. pl. 7. Fitz. Challenge, 63. 44 Ed. 3. 38. pl. 32. Bro. Challenge, 22. 2 Roll. Abr. 645. pl. 5.

[b] Fitz. Challenge, 63, 65. Co. Litt. 156. a. 2 Roll. Abr. 646. pl. 8. 4 H. 7, 8 pl. 3. Trials per pais, ch. 9. State Trials, Vol. 3. fol. 235, 236. Vol. 4. fol. 70, 661. Cro. Eliz. 663. pl. 12.

[c] Vide 2 Rol. Ab. 646. pl. 8. 640. pl. 6. 1 Vent. 309.

[d] *For in the Year Book of* 20 H. 6. 40. a. *Abridged* 2 Roll. Abr. 641. pl. 5, 6. *It is holden in the Case of the Subject to be no Cause of Challenge, that the Sheriff hath Malice against the Party without shewing some particular Instance of Partiality.*

[e] *See the Books cited to the other Parts of this and the next Section.*

[f] Fitz. Challenge, 17. S. P. C. 162. Lett. C. 2 Roll. Abr. 646. pl. 10. *It is said generally in some Books that it is a good Challenge of a Juror that he is the King's menial Servant, or a Valet of the Crown.* Co. Litt. 156. a. Fitz. Cor 63. Trials per pais ch. 9. 2 Roll. Abr. 646. pl. 11. *But* State Trials, Vol. 3. f. 235, 236. V. 4. f. 70. *and in other Books the contrary is ruled.* Bro. Challenge 154. 4 H. 7. 3. pl. 5. Cro. Eliz. 663. pl. 12.

[g] Vide supra Sect. 33.

[h] Co. Litt. 157, 158. Trials per pais, ch. 9. 2 Roll. Abr. 635, *to* 666.

[i] Fitz. Inquest, 22. 3 Ed. 4. 11. pl. 3.

[k] Cro. El. 272. Vide H. P. C. 260, 261.

[l] Cro. Eliz. 272.

[m] Cro. Eliz. 272. 841, pl. 18.

[n] H. P. C. 260. S. P. C. 159.

Sect.

Sect. 37. Alſo it hath been adjudged, [o] That the ſaid Statute of 28 *E.* 3. is repealed as to Trials for Treaſon, by [p] 1 & 2 *Ph. & Ma.* 10. which enacts that all Trials for Treaſon ſhall be according to the Courſe of the Common Law. Yet it ſeems that the [q] King may, if he thinks fit, make a ſpecial Grant to an Alien to be tried for Treaſon by a Jury whereof the one half ſhall be Aliens.

Sect. 38. [a] Alſo it hath been adjudged that the ſaid Statute of 28 *Ed.* 3. doth not extend to an Appeal, or other Action by an Alien againſt an Alien, for the Words are *all Inqueſts*, &c. *between Aliens and Demizens.*

Sect. 39. It is [b] holden, That by Denizens in this Statute are meant not only thoſe who are born within the King's Ligeance, but alſo thoſe who are made Denizens by the King's Letters Patents.

Sect. 40. It ſeems to be [c] ſettled, That no Alien, whether he be Plaintiff or Defendant, can take any Advantage of the Statute, unleſs he [d] pray it in Time; and that if he have neglected to pray it before the Return of a Common *Venire*, he can neither except to ſuch *Venire*, nor pray a *Tales* or other Proceſs *de medietate linguæ.*

Sect. 41. It was [e] holden, even before the Union of the two Kingdoms under King *James* the firſt, that no *Scot* was an Alien within the Meaning of this Statute, not only becauſe the *Scotch* Language is the ſame with the *Engliſh*, but alſo [f] becauſe the *Scots* were never reckoned Aliens, but rather Subjects.

Sect. 42. *Note*, That [g] ſome of the Precedents for the Award of a *Venire* of a Jury of half Denizens and half Aliens, in purſuance of 28 *E.* 3. mention, that the Aliens ſhall be of the ſame Country whereof the Party alledges himſelf; and others direct [h] generally that one half of the Jury ſhall be Aliens, without ſpecifying any Country in particular. And this Form ſeems moſt agreeable to the Statute which ſpeaks of Aliens in general, and ſeems to be confirmed both by late * Practice, and the greater Number of † Authorities.

Sect. 43. If on a *Venire* of half Denizens and half Aliens, the Sheriff return 12 as Aliens, and among them ſome who in Truth are not ſuch, it ¶ ſeems that the Party ſhall not be concluded by ſuch Return, but may notwithſtanding challenge the Array for Want of a ſufficient Number of Aliens.

Sect. 44. It ſeems [l] agreed, That the Return of a *Venire* of half Denizens, and half Aliens, ought to ſpecify which of the Jurors are Denizens and which Aliens, and that a full number of each muſt appear to be ſworn.

Sect. 45. If one or more be wanting to make up the full Number of ſix Denizens or Aliens, the Juſtices of *Niſi prius*, by a reaſonable [m] Conſtruction of the Statutes which give a *Tales de circumſtantibus* may award ſuch a *Tales* for ſo many Denizens or Aliens as ſhall be wanting.

Sect. 46. It is expreſsly enacted by 2 & 3 *P. & M.* and 4 & 5 *Eliz.* 20. ſet forth more at large *B.* 1. *Ch.* 54. that thoſe adjudged Felons, as *Egyptians* by Vertue of thoſe Statutes, ſhall be tried by the Inhabitants of the County or Place where they ſhall be taken, and not *per medietatem linguæ.*

[o] Daliſ. 22. Dy. 144, 145. pl. 61. Inſt. 27. H. P. C. 260.
[p] Vide ſupra Ch. 25. Sect. 134, 144, 146.
[q] S. P. C. 158. Fitz. Trial, 71. 22 Ed. 3. 14. pl. 38.
[a] 21 H. 6. 4. pl. 10 Fitz. Trial, 32. Bro. Trial, 42. S. P. C. 260. Lett. C. H. P. C. 261.
But by 27 Ed. 3. 8. *it is enacted, that in Pleas between Aliens concerning the Staple there ſhall be a Jury of none but Aliens.* S. P. C. 159 Lett. C.
[b] Bro. Den. 4.
[c] Dy. 28, pl. 180, 145. pl. 60, 61. 304. pl. 51. 357. pl. 45.
3 Ed. 4, 11, pl. 3. 22 Ed. 3. 14. pl. 38. 2 Roll. Abr. 643. P. 1. Fitz. Inq. 22. Trial. 71. H. P. C. 261. Bro. Panel, 3. Cont. 21 H. 7, 32, pl. 23. Bro. Deniz. 4. S. P. C. 259.
'Tis holden Cro. Eliz. 869 pl. 3 *by two Judges againſt one, that tho' the Defendant appear by the Declation to be alien, yet the Common* Venire *is well awarded, unleſs*

[a] Venire de medietate *be prayed.* [d] *For the Form of ſuch a Prayer* Raſt. Ent. 7, a. pl. 2, 158, b. 159, a. 264. b. pl. 1, 2. 265 a. Dy. 144. pl. 60. S. P. C. 259. Plow. Com 2. b. [e] Dyer 304 pl. 51. H P. C. 261. [f] *But Quære of this Reaſon, for it ſeems contrary to what is admitted in the whole Argument of Calvin's Caſe,* 7 Co. *See* State Trials, Vol. 1. fol. 572, 573. Vol. 4. fol. 652. *&c.* [g] Dyer 144 pl. 60. Raſt. Ent. 7. b. pl. 2. 159, a. 264 b. pl. 1, 2. [h] Raſt. Ent. 265. a. 10 Co. 104. a. * State Trials, Vol. 3. fol. 1. † H. P. C. 261. S. P. C. 158 Lett. C. Bro. Denizen, 4. Bro. Panel, 3. Cont. Fitz. Trial, 30. *By five Judges againſt one. this being only* ¶ 2 Roll. Abr. 643. pl. 2. Vide S. P. C. 158. Lett. C. [l] Cro. El. 818, pl. 10. 841. pl. 18. *But a miſ-return is help'd by Verdict in Caſes within the Statutes of* Jeofails. [m] 10 Co. 104 a. Cro. Eliz. 305, pl. 3. 818. pl. 10. 841. pl. 18.

CHAP. XLIV.

Of a Trial by Peers.

AS to a Trial by Peers, having ſhewn already, *Ch.* 39. *Sect.* 1. That a Peer has no more Privilege than a Commoner as to having the Benefit of Counſel. And *Ch.* 43. *Sect.* 4. That a Peer cannot challenge any of his Peers, I ſhall now endeavour to ſhew,

1. The particular Form and Solemnity to be obſerved in ſuch a Trial.
2. Who are to be Triers.
3. Who are to be ſo tried.
4. As to what Crimes.
5. Upon what Suits and Pleas.
6. Whether a Peer can waive a Trial by his Peers.
7. In what Manner the Peers may require the Opinion of the Lord Steward or of the Judges.
8. Whether the Court may be adjourned.

And firſt of the particular Form and Solemnity to be obſerved in ſuch a Trial.

Sect. 1. When an Indictment is found againſt a Peer for a Crime for which he ought to be tried by his Peers, the King by his Commiſſion under the Great Seal reciting the Indictment, conſtitutes ſome [a] Peer High [b] Steward of the Kingdom *pro hac vice*, and by the ſame Commiſſion gives him Power to receive and proceed on ſuch Indictment, and requires the Peers to be attendant on him, and the Lieutenant of the Tower to bring the Priſoner before him.

Sect. 2. Alſo * a *Certiorari*, (which may either have the ſame Date with the Steward's Commiſſion, or a ſubſequent one) goes out of Chancery to certify the Indictment before the Steward *indilate*; and the Steward by his Precept under his Seal, directed to thoſe before whom the Indictment was found, appoints a certain Day and Place at which it ſhall be certified. And another Writ goes out of Chancery to the Lieutenant of the Tower, *&c.* to bring the Priſoner before the Steward at ſuch Day and Place as he ſhall appoint, and thereupon the Steward by his Precept under his Seal directed to the Lieutenant, *&c.* appoints the Day and Place.

Sect. 3. Alſo the Steward makes [c] another Precept under his Seal to the Serjeant at Arms, appointed to ſerve him during the Time of his Commiſſion, to ſummon the [d] Peers before him at ſuch a Place, Day, and Hour, *&c.*

[a] Supra, ch. 2.
[b] 1 H. 4. 2. 3 Inſt. 28. 13 H. 8. 11. pl. 1. S. P. C. 152. *the Neceſſity of making a High Steward for the Trial of an Impeachment for High Treaſon was denied by the Houſe of Commons in the Earl of* Danby's *Caſe.* State Trials, Vol. 2. fol. 198, 199.
* 3 Inſt. 28.
[c] *This is to be intended when the Parliament is not ſitting, but is either diſſolved or prorogued.* State Trials, Vol. 3. fol. 659 to 663. 3 Inſt. 28. *Steward ſhall that the Pre-*

S. P. C. 152. a. 13 H. 8. 11. pl. 1. [d] *'Tis ſaid* 13 H. 8. 11 pl 1. S. P. C. 157. a. *That the make ſuch Precept to cauſe* 20 *or* 18 *Peers to come before him, but* Sr Edward Coke, 3 Inſt. 28. *ſays cept doth not mention any certain Number; and now by* 7 W. 3 *all the Peers are to be ſummoned.*

Sect. 4. At the Time appointed the Steward, attended with [a] six or [b] seven Serjeants at Arms carrying Maces before him, and by the King at Arms, and the Usher of the Black Rod, enters the Place of Trial uncovered, and ascends a Chair of State which always is [c] provided for that Purpose, and then the [d] Clerk of the Crown, or a [e] Master in Chancery delivers to him his Commission, and he delivers it again to the Clerk [f] of the Crown, and then a Serjeant at Arms makes three [g] Oyes, and a Proclamation for Silence in the Name of the Steward, and then the Lord Steward and all the other Lords [h] standing up uncovered, the Commission is read, and then the [i] Usher on his Knees delivers to the Steward a White Rod, who redelivers it to him or to a Serjeant at Arms, who holds it by him during the Trial: Then an [m] Oyes is made, and a Command given in the Name of the Steward to all Justices and Commissioners to certify all Indictments, *&c.* which being delivered into Court, the Clerk of the Crown reads the Return. Another Oyes is made that the Lieutenant of the Tower, *&c.* return his Writ and Precept, and bring the Prisoner to the Bar, and then the Prisoner is brought to the Bar, the [n] Gentleman-Gaoler of the Tower carrying the Axe before him, which being [o] done the Clerk reads the Return.

Sect. 5. All things being thus prepared, the High Steward * acquaints the Prisoner with the Nature of the Crime, and such like Matters proper for such an Occasion, and then the Clerk of the Crown arraigns him, [q] but is not to insist on his holding up his Hand.

Sect. 6. After the Prisoner hath pleaded and put himself upon God and his Peers, the King's Counsel go thro' with their Evidence; and after the Prisoner hath made his Defence, and the King's Counsel have been fully heard, the Prisoner is withdrawn from the Bar, and the *Lords* go together to consider of their Evidence; and when a Majority of them are agreed, they return to the Place of Trial, and the Lord Steward demands of them one by one, beginning with the Puisne, whether the Person arraigned be Guilty or Not Guilty, and they [r] all answer one by one, not upon their Oaths but on their [s] Honours and Ligeances. And the Lord Steward gives Judgment according to the Determination of the [t] Majority being more than twelve, but gives no Vote himself on a Trial by [u] Commission, but only on a Trial by the House of Peers, while the Parliament is sitting.

Sect. 7. As to the second Point, *viz.* Who are to be Triers: It is agreed, [x] That none but Lords, who have a Vote in Parliament can pass on such a Trial; and before 7 *W.* 3. 3. when the Trial was by Commission, it seems to have been the Practice for the Lord Steward to cause as many Temporal Lords to be summoned as he thought fit; and for the Lords so summoned alone to pass on the Trial. But this is remedied by that Statute set forth more at large in the next Section.

[a] 3 Inst. 28.
[b] Rushw. Collections, Part. 2. Vol. 1. fol. 96. Vide 2 Jon. 54.
[c] 3 Inst. 28. S. P. C. 152. 1 H. 4. 1. 13 H. 8. 11. pl. 1.
[d] 3 Inst. 28.
[e] Rushw. Collections, Part 2. Vol. 1. fol. 96.
[f] 3 Inst 28. Rushworth's Collections, Part 2. Vol. 1. fol 96.
[g] 1 H. 4. 1. 3 Inst. 28.
[h] State Trials, Vol. 3. f. 955. Vol. 4. fol. 350.
[i] 3 Inst. 28. Rushworth's Collections, Part 2. Vol. 1. fol. 96.
[m] 3 Inst. 28.
[n] State Trials, Vol. 3. f. 955. Vol. 4. fol. 355.
[o] By 3 Inst. 28. *All this is to precede the Call of the Peers and their seating themselves; but* 1 H. 4. 1. *and* 13 H. 8. 11. b. *and* S. P. C. 152 a. *and* State Trials, Vol. 1. f. 266. Vol. 3. f. 955, 956. *and* Vol. 4. f. 353 *to* 355. *and* 2 Jon. 55. *are contrary.*
* 3 Inst. 29. S. P. C. 152. a. 2 Jon. 55. *and the other Books cited to the precedent Section.*
[q] Raym. 408. State Trials, Vol. 3. fol. 658, 957. Vol. 2. 702, 703.
[r] 3 Inst. 30. 2 Inst. 49. Fitz. Coro 34. 1 H. 4. 1. a. S. P. C. 152. 13 H. 8. 12. 2 Jon. 55. 56. 10 Ed. 4. 61. pl. 17.
[s] *See the Books above-cited, and* 1 Co. 30. b. 2 Inst. 49.
[t] 1 H. 4. 1. 13 H. 8 12. S. P. C. 153. E. 3 Inst. 30. Moor 622.
[u] State Trials, Vol. 2. fol. 702. Vol. 3. fol. 657, 679.
[x] 2 Inst. 48. Co. Litt. 156.

Sect. 8. It is agreed, That at a Trial before the Houſe of Peers, every Temporal Lord who has a Right to vote in that Houſe, has a Right to paſs on ſuch Trial, But it is ſaid in the *Year-Book* of 10 *Ed.* 4. 6. [a] *pl.* 17. That upon the Trial of a Peer in Parliament, the Biſhops ſhall make a Procurator, becauſe they cannot conſent to the Death of a Man; but this is [b] ſaid to be wholly grounded on a Canon not in Force at this Day, neither do I find any Precedent wherein they have been excluded againſt their Conſent, or have withdrawn themſelves without a Proteſtation of their Right, or making a Proxy; and the Judgment againſt the *Spencers*, was expreſsly reverſed for this Reaſon among others, becauſe the Biſhops were not preſent; and in the Precedents chiefly inſiſted on of the other Side, it is not expreſsly ſaid that they were not preſent, and it doth not clearly appear, but that they might be included under the Word Peers. However it hath been always [c] admitted that they have a Right to vote in a Bill of Attainder: Alſo in the Earl of *Danby*'s Caſe, they were adjudged[d] by the Houſe of Lords to have a Right to vote in Queſtions previous to the Trial of a Peer, tho' this was ſtrongly oppoſed by the Houſe of Commons. And their Right to vote at the Trial itſelf, if they think fit, ſeems fully implied in 7 *W.* 3. 3. which enacts, *That upon the Trial of any Peer or Peereſs for Treaſon or Miſpriſion, all the Peers who have a Right to ſit and vote in Parliament ſhall be ſummoned twenty Days at leaſt before every ſuch Trial, to appear at every ſuch Trial, and that every Peer ſo ſummoned and appearing, ſhall vote at the Trial, every ſuch Peer firſt taking the Oaths of Allegiance and Supremacy, and ſubſcribing and repeating the* * *Declaration againſt Popery.*

Sect. 9. As to the third Point, *viz.* What Perſons are to be thus tried: It is [f] agreed, That no Lord of any [g] other Country, or even of [h] *Scotland*, before the Union under Queen *Anne*, or of [h] *Ireland*, nor the Son and Heir [i] apparent of any Peer, nor any other Man whatſoever, who is not at the Time a Lord of Parliament, hath any Right to ſuch a Trial in this Kingdom. But that every Lord of Parliament hath a Right to ſuch a Trial [k] by Vertue of that Clauſe in *Magna Charta*, *ch.* 29. *Nec ſuper eum ibimus, nec ſuper eum mittemus, niſi per legale judicium parium ſuorum vel per legem terræ.*

Sect. 10. It is recited by 20 *H.* 6. 9. *to have been a Doubt in the Law of* England *how Ladies of great Eſtate in Reſpect of their Husbands, Peers of the Land, married or ſole, that is to ſay, Dutcheſſes, Counteſſes or Baroneſſes, ſhall be put to anſwer, and judged upon Indictments of Treaſons and Felonies, becauſe they are not mentioned in the ſaid Statute of* Magna Charta, ch. 29. *and thereupon to put out ſuch Doubts, it is* [l] *declared, That ſuch Ladies ſo indicted of any Treaſon or Felony, whether they be married or ſole, ſhall thereof be brought to anſwer, and judged before ſuch Judges and Peers of the Realm, as Peers of the Realm ſhould be, if they were indicted or impeached of ſuch Treaſons or Felonies.*

Sect. 11. It ſeems [m] agreed, That a Queen, the King's Conſort, and alſo a Queen Dowager, whether ſhe continue ſole after the King's Death, or take a ſecond Husband, be he a Peer or Commoner; and alſo all Peereſſes by Birth, whether they be ſole or [n] married to Peers or Commoners; and alſo all Marchioneſſes and Viſcounteſſes, are intitled to a Trial by the Peers, tho' none of them be expreſsly mentioned in this Act, or in *Magna Charta*. But it is [o] agreed, that a Peereſs by Marriage loſes her Dignity by marrying a Commoner.

[a] *Abridged* Fitz. Coro. 34. *Cited* S. P. C. 153. Lett. B. Brook *in a Note of the ſame Caſe*, Coro. 153. *ſays that they ſhall make Proxies.* Sir Edward Coke, 3 Inſt. 31. *ſays that they muſt withdraw and make their Proxies.*

[b] *See* Biſhop Stillingfleet, *of the Biſhops Juriſdiction in Criminal Caſes*, Ch. 2, 3. *and* Hunt's *Argument*, Ch. 9, 10, 11.

[c] *See* Hunt's *Argument for the Right of Biſhops*, &c. Ch. 12. *and* Stillingfleet *of the Biſhops Juriſdiction in Capital Caſes*, Ch. 1. Sect. 3. *and* Ch. 2.

[d] State Trials, Vol. 2. f. 179 *to* 202.

* B. 1. Ch. 14. Sect. 1.

[f] 2 Inſt. 48. 3 Inſt. 30. Co. Lit. 156. b.

[g] Vide Fitz. Brief, 473. 20 Ed. 4. 6. pl. 6. Bro. noſme de Dignity, 49.

[h] 9 Co. 117. Vide 39 Ed. 3. 35. b. Bro. noſme de Dignity, 29.

† Vide ſupra Ch. 25. Sect. 50.

[i] Bro. Treaſon, 2.

[k] *Such Trial is ſaid to be very ancient.* 2 Inſt. 50.

[l] 2 Inſt 45. 50.

[m] 2 Inſt. 50. Crompt. Juriſd. 33. b.

[n] *See the Citations to the next Letter.*

[o] 2 Inſt. 50. Co. Litt. 16. b. 6 Co. 53. b. Dy. 79 pl. 51.

Sect.

Sect. 12. It is said by [a] *Staundforde* and [b] *Coke*, That those who are Lords of Parliament, not in Respect of their Nobility, but of their Baronies which they hold of the Crown, as Bishops now do, and some Abbots and Priors [c] did formerly, are not within the Intent of *Magna Charta*, to be tried by the Peers. And [d] *Selden* seems clear, That this is the only Privilege which Bishops have not in Common with other Peers. And those who seem [e] most for the contrary Opinion admit that the Law hath been generally so taken. Neither do they produce any Precedent where a Bishop or Abbot has been tried by the Peers upon a Commission; but on the contrary admit that there are [f] two Precedents of their being tried by the Countrey. And it is said by [g] others, That there are divers Precedents of this Kind; yet *Selden*, with his utmost Diligence, seems able to produce but two, which clearly and fully come up to his Point, *viz.* those of Archbishop *Cranmer* and Bishop *Fisher*. However it seems to be [h] agreed, that while the Parliament is sitting a Bishop shall be tried by the Peers.

Sect. 13. As to the fourth Point, *viz.* As to what Crimes a Peer is to be tried by his Peers: I take it to be [i] agreed, That he has a Right to be so tried upon an Indictment of Treason or Felony, [k] whether such Treason or Felony be made such by the Common Law, or by Statute; and also upon an Indictment for a Misprision of Treason or Felony; but it [l] seems that regularly he is to be tried by the Country for all other Crimes, out of Parliament, as [m] *Præmunire*, [n] Riot, [o] seducing a young Lady from her Parents in order to debauch her, *&c.*

Sect. 14. As to the fifth Point, *viz.* Upon what Suits and Pleas a Peer is to be tried by his Peers, it hath been [p] adjudged, That he shall not be so tried upon an Appeal of Felony, but only upon an Indictment; and the Reason given for it is, that those Words in *Magna Charta*, *ch.* 29. *nec super eum ibimus, &c.* are to be intended only of the Suit of the King, and not of the Suit of the Subject.

Sect. 15. Also it hath been [q] adjudged, and appears from constant [r] Experience, That neither the said Clause of *Magna Charta*, nor any other Law privileges a Peer from being indicted by a Grand Jury of Commoners, either in the King's Bench, or before Commissioners of *Oyer*, or the Coroner, *&c.*

Sect. 16. Also it seems [s] to be clear, That if a Peer absent himself, and cannot be found, he may be outlawed *per judicium coronatorum, &c.*

Sect. 17. Also it is said that the Court of King's Bench may allow a [t] Pardon pleaded by a Peer to an Indictment in that Court: But that it cannot receive either his Plea of Not guilty, or Confession, but only the Lord Steward on an Arraignment before the Lords.

Sect. 18. It seems clear, That if a Peer be * attainted of Treason or Felony, he may be brought before the King's Bench and demanded, What he has to say why Execution should not be awarded against him? And if he plead any Matter to such Demand, his Plea shall be discussed and Execution awarded by the said Court, upon its being adjudged against him.

S. P. C. 152. A.

[b] 3 Inst. 30. *But in* Fitz. Coro. 161 *it seems admitted that a Bishop shall be tried by the Peers in Cases proper for such Trial. and* Brook *tit.* Trial, 142. *cites a Note from* Fitz. Challenge, 115. *wherein he says it was holden, That Bishops shall be tried by the Peers, but this is mistaken, for there is no such Opinion there holden.*

[c] Co Litt 97. Fuller's Ch. History. B. 6. fol. 292.

[d] Selden of Baronage, p. 152. Titles of Honour, 1*st Edit. pa.* 347.

[e] Hunt's *Argument for the Bishops Right in Capital Cases*, Ch. 18. Gibson's Codex, 154. Stillingfleet *of the Bishops Jurisdiction in Capital Cases*, Ch. 4.

[f] Bro. Trial, 142. *See* Hunt's *Argument* Ch. 18. *and* Stillingfleet *of the Bishops Jurisdiction in Capital Cases.*

[g] S. P. C. 153. Lett. A. Seld. Barona. 142 *to* 155.

[h] Vide 3 Inst. 30.

[i] *See* Hunt's *Arguments*, Ch. 18. Trials per pais Ch. 2. para. 8. State Trials, Vol. 1. f. 374. Stillingfleet *of the Bishops Jurisdiction in Capital Cases.* [i] 3 Inst. 30. 2 Inst. 49.

S. P. C. 153. Lett. D. 1 Bulst. 198. [k] S. P. C. 158. Lett. D. E. F. 1 Bulst. 198. [l] *See the Books above-cited.* State Trials, Vol. 2. f. 3. Fitz. Coro. 161. [m] 1 Bulst 198, 199. 3 Inst. 30. 12 Co 93.

[n] State Trials Vol. 3. fol. 79. [o] State Trials, Vol. 3. fol. 52. 12 Co. 93. [p] 10 Ed. 4 6. pl. 17. Fitz. Coro. 34. Bro. Coro. 153. S. P. C. 152. Lett. A. 2 Inst. 49. 3 Inst. 30. Rast. Ent. 50. pl. 7. [q] 3 Inst. 26, 28. 2 Inst. 49. [r] 1 H. 4. 1. State Trials, Vol. 3. fol. 52, 79, 657, 951. Vol. 4. f. 351, &c. [s] 3 Inst 31. 2 Inst. 49. [t] 2 Inst. 49. * 1 H. 7. 22, 23. pl. 15. Bro. Coro. 129. Treason, 18. Fitz. Coro. 49.

Sect. 19. As to the ſixth Point, *viz.* Whether a Peer can waive a Trial by his Peers, it hath been [a] adjudged, That if a Peer on an Arraignment before the Lords refuſe to put himſelf upon his Peers, he ſhall be dealt with as one that ſtands Mute; for it is as much the Law of the Land that a Peer be tried by his Peers, as a Commoner by Commoners. Yet if one who has a Title to Peerage, be indicted and arraigned as a Commoner, and plead Not guilty, and put himſelf upon his Country, it hath been [b] adjudged that he cannot afterwards ſuggeſt that he is a Peer, and pray a Trial by his Peers.

[a] Ruſhw. Collections, Part 2. Vol. 1. fol. 94. 3 Inſt. 30. Kely. 57. *Yet there is ſaid to be a Record in* 4 Edw. 3. *That* T. *Lord* Berkley, *put himſelf on his Country, and was tried by a Jury of Kts.*

[b] Daliſ. 16.

Sect. 20. As to the ſeventh Point, *viz.* In what Manner the Peers may require the Opinion of the Lord Steward, or of the Judges: It was [c] reſolved by all the Judges in the Lord *Dacre*'s Caſe, who was tried by Commiſſion, that no Queſtion ought to be asked of the Lord Steward or of the Judges in the Abſence of the Priſoner. And it was [d] adjudged by the Lord Steward, in the Earl of *Warwick*'s Caſe, who was tried by the Houſe of Peers in Parliament, that that no Queſtion ought to be asked of the Judges in the Abſence of the Priſoner. But in the Lord *Audley*'s Caſe, who was tried by Commiſſion, the Lords Triers, [e] after they were withdrawn, conſulted with the Lord Chief Juſtice four ſeveral Times, and alſo ſent to conſult with the Lord Steward. Yet, notwithſtanding this Precedent, the Judges [f] reſolved in the Lord *Morley*'s Caſe, who was likewiſe tried by Commiſſion, that if after the Lords were withdrawn they ſhould ſend for any of the Judges to deſire their Opinions on a Point in Law, and the Lord Steward ſhould permit them to go, they wou'd tell the Lords, if they ſhould ask them any Queſtion, that they were not to give any private Opinion, without Conference with the reſt of the Judges, and that openly in Court. But they reſolved that if the Lord Steward ſhou'd ask them any Queſtion in open Court, tho' in the Abſence of the Priſoner, they wou'd anſwer it, becauſe they are called to aſſiſt the Court, and the Demand of any Queſtion in ſuch Caſe is to be referred to the Diſcretion of the Lord Steward.

[c] 3 Inſt. 29, 30. 2 Inſt. 49. Kely. 57. State Trials, Vol. 3. fol. 679.

[d] State Trials, Vol. 4. fol. 381.

[e] Ruſhw. Collections, Part 2. Vol. 1. fol. 101. State Trials Vol. 1. fol. 271.

[f] Kely. 54.

Sect. 21. When a Peer is tried before the Houſe of Peers in Parliament, the Lord Steward [g] withdraws with the reſt of the Lords, and conſults with them.

[g] State Trials, Vol. 3. fol. 679.

Sect. 22. As to the eighth Point, *viz.* Whether the Court may be adjourned: It is agreed, [h] That where a Peer is tried by the Houſe of Lords in full Parliament, the Houſe may be adjourned as often as there is Occaſion, and the Evidence taken by Parcels: Alſo it hath been [i] adjudged, That where the Trial is by Commiſſion, the Lord Steward, after a Verdict is given, may take Time to adviſe upon it, and that his Office continues till he has given Judgment. Alſo it is [k] ſaid to have been agreed by the Judges in the Lord *Dacre*'s Caſe, that on ſuch a Trial the Court might be adjourned, and that if the Lords Triers did not agree, it was holden by ſome they ought to be kept together all Night, and by others that they might go to their ſeveral Houſes. But it is ſaid, [l] That there is no Precedent of the Lords Triers ever having ſeparated upon a Trial by Commiſſion, after the Evidence has been given for the King; and it is ſaid to have been [m] reſolved by all the Judges in the Caſe of the Duke of *Norfolk*, That the Peers in ſuch Caſe muſt continue together till they agree to give a Verdict, and the like was [n] adjudged by the Lord Steward in the Lord *Delamere*'s Caſe.

[h] State Trials, Vol. 2. f. 654. Vol. 3. f. 677 *to* 680.

[i] Ruſhw. Collections, Part 2. Vol. 1. fol. 95. State Trials, Vol. 1. f. 265. *But* Moore, 622. *ſeems contrary.*

[k] Kely. 57. *But* Moore, 622, *in a Report of the very ſame Caſe it is ſaid that the contrary was holden.*

[l] State Trials Vol. 3 fol. 678. *But ſee* Moore 622.

[m] 3 Inſt. 30. *in the Margent.*

[n] State Trials, Vol. 3. fol. 677 *to* 680.

CHAP. XLV.

Of Trial by Battle.

Sect. 1. A Trial by Battle, at the [a] Defendant's Choice, is allowable in Appeals [b] of Treason before the Conſtable and Marſhal, and in Appeals [c] of Felony, whether by Appellants or [d] Approvers.

Sect. 2. For the Manner of waging Battle in an Appeal of Treaſon, being according to the Civil Law, I ſhall refer to *Ruſhworth's Collections, Part* 2. *Vol.* 1. *fol.* 112 *to* 128.

Sect. 3. When an Appellee of Felony wages Battle, he pleads [e] that he is Not guilty,, and that he is ready to defend the ſame by his Body, and then [f] flings down his Glove, and if the Appellant will join Battle, he replies that he is ready to make good his Appeal by his Body upon the Body of the Appellee, and takes up the Glove: And then the Appellee lays his [g] right Hand on the Book, and with his left Hand takes the Appellant by the Right, and [h] ſwears to this Effect, *Hear this thou who calleſt thy ſelf* John *by the Name of Baptiſm, that I, who call my ſelf* Thomas *by the Name of Baptiſm, did not felonioufly murder thy Father* W. *by Name, (on the Day of in the Year of at* B. *as you ſurmiſe, nor am any way guilty of the ſaid Felony; ſo help me God,* (and then he ſhall kiſs the Book and ſay) *and this I will defend againſt thee by my Body as this Court ſhall award.* And then the Appellant lays his right Hand on the Book, and with the left Hand takes the Appellee by the Right, and ſwears to this Effect, *Hear this thou who calleſt thy ſelf* Thomas *by the Name of Baptiſm, that thou felonioufly (on the Day of in the Year of at* B.) *didſt murder my Father,* W. *by Name, ſo help me God,* (and then he ſhall kiſs the Book and ſay) *and this I will prove againſt thee by my Body, as this Court ſhall award.* And then the Court ſhall [i] appoint a Day and Place for the Battle, and in the mean while the Appellee ſhall be kept in the [k] Cuſtody of the Marſhal, and the Appellant ſhall find [l] Sureties to be ready to fight at the Time and Place, unleſs he be an Approver, in which Caſe [m] he ſhall alſo be kept by the Marſhal. And the [n] Night before the Day of Battle, both Parties ſhall be arraied by the Marſhal, and ſhall be brought into the Field before the [o] Juſtices of the Court where the Appeal is depending, at the riſing of the Sun, [p] bare-headed, and bare-legged from the Knee downwards, and bare in the Arms to the Elbow, and armed only with Baſtons an Ell long, and four cornered Targets, and before they engage they ſhall both take this [q] Oath, *Hear this ye Juſtices, that I,* A. B. *have neither eat nor drunk, nor done any Thing elſe, nor any other for me, by which the Law of God may be depreſſed, and the Law of the Devil exalted.* And then after [r] Proclamation for Silence under Pain of Impriſonment for a Year and a Day, &c.

[a] Finch of Law, 421. S.P.C. 176. Letter F. Fleta, lib. 1. ch. 34. S. 27. Trialsper pais, ch. 2. Sect. 19.

[b] Vide ſupra, Ch. 23. S. 29. Crompt. Jur. 82, b. 88. a. Bro. Battle 15.

[c] Raſt. Ent. 50. pl. 10. Cro. Eliz. 69. pl. 22. Dyer 120. pl. 10. S. P. C. 176. ch. 13, 14. *and the Books cited to the other Parts of this Chapter.*

[d] Raſt. Ent. 42. pl. 3. S. P. C. 178. b. 9 Co. 31. b.

[e] Cro. Eliz. 69. pl. 22. Raſt. Ent. 42. pl. 3. 50. pl. 10. Dyer, 120. pl. 10. 9 H. 4. 3. pl. 16.

[f] S. P. C. 178. Lett. K. Fitz. Coro. 385. Vide 1 H. 6, 6. b.

[g] Bro. Battle, 1, 6. 9 H. 4, 3. pl. 16. 17 Aſſ pl. 1. 17 Ed. 3, 2. pl. 6. Britton, 41.

[h] Fleta B. 1. ch. 34. S. 28, 29. 9 H. 4, 3. pl. 16. 17 Aſſ pl. 1. Bro. Battle 1, 6. 17 Ed. 3, 2 pl. 6. Britton, 41. Bract. B. 3. Ch. 21. S. 2.

[i] Raſt. Ent. 42. b. pl. 2. S. P. C. 178. Bro. Battle, 1. Fleta, B. 1. ch. 33. S. 28. Raſt. Ent. 42. b. pl. 2. 9 H. 4, 3. pl. 16. S. P. C. 178. Fitz. Coro. 78, 111.

[k] Fleta, B. 1. Ch. 34. S. 28. 9 H. 4. 3. pl. 16. 17 Aſſ. pl. 1. S. P. C. 178. Let B. Fitz. Cor. 78, 111. Bro. Battle, 1, 6. 17 Ed. 3, 2. pl. 6. Bract B. 3. Ch. 21. S. 3. *Says that both Parties ſhall be kept in Cuſtody.*

[l] Raſt Ent. 42. b. pl. 2.

[m] 9 H 4, 3. pl. 16. Bro. Battle. 1. Sect. 30, 31. Dyer 301. Bro. Battle 15. S. P. C. 177, 178.

[n] Fleta B. 1. Ch. 34 Cont. 37 H. 6 20. Britt. 41. *By ſome the Appellant's Head ſhall be covered.* 9 H. 4. 3. pl. 16. Bro. Battle. 1 Vide 1 H. 6, 6 7. Dyer 301. Bract B. 3. Ch. 21 Sect. 4. Britt. f. 40

[o] Fleta, B. 1. Ch. 34. S. 30. Bract B. 3. Ch. 21 Sect. 4. Britt. 40. Fleta, B. 1. Ch. 34. S. 31.

&c. they ſhall begin the Combat, wherein if the Appellee be ſo far vanquiſhed that he cannot or will not fight any longer, he may be adjudged to be[x] hanged immediately; but if he can maintain the Fight till the Stars appear, he ſhall have [b] Judgment to go quit of the Appeal. And if the Appellant become Recreant, that is a Crying Coward, or Craven, the Appellee ſhall not only recover his Damages, but may alſo, as it †ſeems, plead his Acquittal in Bar of a ſubſequent Indictment or Appeal, and the Appellant [c] ſhall for his Perjury loſe his *liberam legem.* Yet if there be other Appellees in the ſame Appeal, it hath been adjudged, [d] that it ſhall ſtill ſtand in Force againſt them. But for theſe Matters I ſhall refer to *Ch.* 24. *Sect.* 24.

Sect. 4. In Appeals each Party muſt fight in proper [e] Perſon, and not by Champions. And therefore if the Appellant be under an apparent Diſability of fighting, as being a [f] Woman, or in [g] Holy Orders, or under [h] Age, or of the Age of [i] ſixty, [k] or maimed, or [l] blind, he may counterplead the Wager of Battle, and compel the Appellee to put himſelf upon his Country. [m] Alſo if an Appellant become blind by the Act of God after he has waged Battle, the Court will diſcharge him of the Battle; and in ſuch Caſe it is [n] ſaid that the Appellee ſhall go free.

Sect. 5. Alſo if a [o] Peer of the Realm, and much more if the King, bring an Appeal, the Defendant ſhall not be admitted to wage Battle, by Reaſon of the Dignity of their Perſons.

Sect. 6. Alſo the Citizens of *London* have a ſpecial [p] Privilege by Charter, that in Appeals brought by any of them, there ſhall be no Wager of Battle.

Sect. 7. Alſo any Plaintiff may counterplead a Wager of Battle, by alledging ſuch Matters againſt the Defendant as induce a violent Preſumption of Guilt; as in an Appeal of Robbery, by ſhewing [q] that the Defendant was taken with the Manner, *&c.* And in an Appeal of Death, that he was [r] found lying upon the Deceaſed with a bloody Knife in his Hand; and in any Appeal by ſhewing that the Defendant being under an Arreſt for the Crime charged againſt him, [s] brake the Priſon, or [t] eſcaped, unleſs ſuch Breaking or Eſcape be [u] pardoned. For the Law will [x] not oblige a Plaintiff to make good his Accuſation in ſo extraordinary a Manner, when in all appearance he may prove it in the ordinary way. It is alſo a good Counterplea of Battle that the Defendant hath been [k] indicted for the ſame Fact, unleſs the Indictment were inſufficient.

Sect. 8. It is enacted by 6 *Ric.* 2. That the Defendant ſhall not be received to wage Battle in an Appeal of Rape.

[x] S P.C. 178. [b] *See where this is done accordingly.* 19. H. 6. 35. pl. 75. Fitz. Coro. 6. Bro. Coro 46. Bract. B. 1. Ch. 21. S. 6. [b] Trials per pais, ch. 2. Sect. 19. 3 Inſt. 221. Fleta, B. 1. Ch. 34. Sect. 32. Bract. B 3. Ch. 21. S. 5. † Supra, ch. 23. Sect. 140. *and* ch. 35. Sect. 6. Fitz. Coro. 98. Fleta, B. 1. Ch. 34. S. 32. [c] 3 Inſt. 221. Co. Lit. 6. b. [d] Fitz. Coro. 98. [e] Finch of Law, 421, 422. 9 Co. 31. b. 3 Inſt. 221. Plow. Com. 335. b. Trials per pais, ch. 2. Sect. 19. [f] Keilw. 120. pl. 66. Fleta, B. 1. ch. 34. S. 25. S. P. C. 180. Lett. A [g] Britton, 40. [h] Keilw. 120. pl. 66. Finch of Law 423. Fitz droit, 3. C 60 Let. D. B. 1. ch. 34. a. Trial [m] Fitz droit Plow. Com. of Law, 422, 19. b. Bro. Law, 179. Fitz. Coro. Aſſ. pl. 6. 1 Aſſ. pl. 3. 11. Appeal,

S P. C. 60. Lett. D. 180. Lett. A. 22 Ed. 4. 20. a. Fleta, B. 1. Ch. 34. Sect. 25. [i] S. P. C 60 Let. D. 180. Lett. A Fitz. Coro. 385. 22 Ed. 4. 20. a. Trials per pais, ch. 2. Sect. 19. Fleta Sect. 25. [k] Finch of Law, 423. Fitz. Coro. 230, 268. S. P. C. 180. Lett. A. 22 Ed. 4. 20, per pais, ch. 2. Sect. 19. Fleta, B. 1. ch. 34. Sect. 25. [l] Fitz. droit, 57. 3 Inſt. 158, 159. 57. 3 Inſt. 158, 159. [n] 3 Inſt. 158, 159. [o] Finch of Law, 423. S. P. C. 152. Lett A. 335. b. Fleta, B. 1. Ch. 34. Sect. 25. [p] S. P. C. 180. Lett. C. Fitz. Coro. 125, 187. [q] Finch 423 S. P. C. 179. Fitz. Coro. 100, 125, 144, 157, 230, 268, 375. 4 Aſſ. pl. 1. 22 Ed. 4. Battle, 5, 7. Appeal, 114. 20 H. 7, 8. pl. 18. Vide ſupra, Ch. 15. Sect. 41. [r] Finch of S. P. C. 179 Fitz Coro. 411. [s] Finch of Law, 422. S. P. C. 180. 1 Aſſ. pl. 3. 6. Hob. 82. 154, 157, 164, 251, 281. [t] Finch of Law, 422. Hob. 82. S. P. C. 80. Bro. Battle, 3. 1 Fitz Coro. 164, 251. [u] S. P. C. 180. Hob. 82. Fitz. Coro. 154, 281. Bro. Battle, 3. [x] Trials per pais, Ch. 2. S. 19. [y] Finch of Law, 422. 22 Ed. 4 19. b. Bro. Battle, 7, 114. 20 Ed. 4, 6 pl. 5. Raſt Ent. 50. pl. 10.

CHAP. XLVI.

Of Evidence.

Sect. 1. AS to the Nature of Evidence, ſo far as it more particularly concerns Criminal Caſes, having premiſed that it is a ſettled Rule, That in Caſes of Life no [a] Evidence is to be given againſt a Priſoner but in his Preſence; and that it hath been [b] adjudged, That no Bill of Exceptions is grantable on an Indictment of Treaſon or Felony, the Statute of *Weſtminſter* 2. 3. *Cum aliquis implacitatus, &c. proponat exceptionem, &c.* having never been thought to extend to any ſuch Caſe, it being plain that it could not but cauſe an infinite Delay of Juſtice if it ſhould; I ſhall more fully conſider the following Points,

1. How many Witneſſes are required in Criminal Caſes.
2. What is to be allowed as Evidence.
3. Who may be Witneſſes.
4. In what Manner the Witneſſes for the Defendant are to give their Evidence.
5. Whether a Defendant have Right to Proceſs to bring in his Witneſſes.
6. What Evidence maintains an Indictment, *&c.*
7. What may be given in Evidence on the Part of the Defendant.

Sect. 2. As to the firſt Point, *viz.* How many Witneſſes are required in Criminal Caſes: Having already endeavoured to ſhew that the Common Law did [c] not require any certain Number of Witneſſes for the Trial of any Crime whatſoever, I ſhall only add in this Place, That it ſeems to have been the more * prevailing Opinion, that 1 [d] *E.* 6. 12. and 5 *&* 6 *E.* 6. 11. which required two Witneſſes in Treaſon, were not repealed by 1 *&* 2 *Ph. & M.* 10. which ordered that all Trials of Treaſon ſhould be according to the Courſe of the Common Law; and therefore that it was ſtill neceſſary in all Trials of High Treaſon, not concerning the Coin, to have either two Witneſſes to the [d] ſame Overt-Act, or one Witneſs to one, and another [e] Witneſs to another Overt-Act of the ſame kind of Treaſon, or at leaſt one Witneſs to an Overt-Act, and [f] another to a material Circumſtance to prove it. In Relation to which Matters the Law ſeeming to be ſettled by 7 [f] *W.* 3. which is expreſs, *That no Perſon ſhall be indicted, tried or attainted for High Treaſon, but upon the Oaths of two lawful Witneſſes, either both of them to the ſame Overt-Act, or one of them to one, and the other of them to another Overt-Act of the ſame Treaſon*; it will be need-

[a] State Trials, Vol. 4. fol. 277, 310.

[b] *Sir* Henry Vane's *Caſe*, State Trials, Vol. 1. fol. 938. *wherein it is ſaid that ſuch Bill never was nor ought to be allowed in any Capital Caſe, and as this Caſe is reported in* 1 Sid. 85. 1 Keb. 384. *it ſeems to have been holden that it is not grantable on any Indictment, and as it is reported in* 1 Lev. 68. *and* Kely. 15. *That it is not grantable in any Criminal Caſe whatſoever.* Vide 2 Inſt. 427.

[c] Ch. 25. Sect. 131.

* H. P. C. 262. *and the Authorities cited to the other Parts of this Section.* Cont. State Trials, Vol. 1. fol. 180, 181, 636. V. 2. fol. 408. *and* ſupra Ch. 25. Sect. 131.

¶ *For theſe Statutes, and their Expoſition See* ch. 25. Sect. 132 *to* 148.

[d] Raym, 407, 408. State Trials, Vol. 2. fol. 533. Vol. 3. fol. 688, 689.

[e] State Trials, Vol. 1. fol. 697, 723, 724. Vol. 2. fol. 317, 695, 785, 829, 830. Vol 3. fol. 149, 156, 228. Vol. 4 f. 86, 87, 88, 117. Raym. 407, 408. Kely. 9.

[f] State Trials, Vol. 2. fol. 408. Vol. 3. fol. 228, 229, 688, 689, 894 *to* 901. 928, 929, 930. Vide State Trials, Vol. 1. fol. 636. *But* State Trials, Vol. 1. fol. 180, 181. *'tis holden that Circumſtantial Evidence alone is ſufficient.* Vide Ch. 25. Sect. 136 *to* 148.

leſs at this Day to examine how far theſe Opinions were reconcileable with 1 *Ph. & Ma.*

As to the ſecond Point, *viz.* What is to be allowed as Evidence in Criminal Caſes, I ſhall conſider,

1. Where the Confeſſion of the Defendant or the Depoſitions of others out of Court may be allowed as Evidence.
2. How far Hearſay is Evidence.
3. Whether Similitude of Hands be any Evidence in Criminal Caſes.

Sect. 3. As to the firſt Particular, *viz.* Where the Confeſſion of the Defendant, or the Depoſitions of others, out of Court, may be allowed as Evidence: It ſeems that the Confeſſion of the Defendant himſelf, whether taken upon an [a] Examination before Juſtices of Peace, in purſuance of 1 & 2 *Ph. & M.* 13. or of 2 & 3 *Ph. & Ma.* 10. upon [b] a Bailment or [c] Commitment for Felony, or taken by the Common Law upon an Examination before a Secretary of State, or other Magiſtrate, for [d] Treaſon, or [e] other Crimes, not within theſe Statutes, or in [f] Diſcourſe with private Perſons, hath always been allowed to be given in Evidence againſt the Party confeſſing, but [g] not againſt others.

Sect. 4. Alſo it was [h] holden, That two Witneſſes of a Confeſſion of High Treaſon, upon an Examination before a Juſtice of Peace, were ſufficient to convict the Perſon ſo confeſſing, within the Meaning of 1 *E.* 6. 12. and 5 & 6 *E.* 6. 11. which required two Witneſſes in High Treaſon, *unleſs the Offender ſhould willingly without Violence confeſs the ſame*; But this is remedied by 7 *W.* 3. 3. which requires two Witneſſes, *unleſs the Party ſhall willingly, without Violence, in open Court confeſs, &c.*

Sect. 5. It [i] ſeems an eſtabliſhed Rule, that where-ever a Man's Confeſſion is made uſe of againſt him, it muſt all be taken together, and not by Parcels.

Sect. 6. It ſeems [k] ſettled, That the Examination of an Informer taken upon [l] Oath, and * ſubſcribed by him either before a [m] Coroner upon an Inquiſition of Death in purſuance of 1 & 2 *Ph. & M.* 13. or before [n] Juſtices of Peace in purſuance of 1 & 2 *Ph. & M.* 13. and 2 & 3 *P. & M.* 10. upon a [o] Bailment or [p] Commitment for any Felony, may be given in Evidence at the Trial of ſuch Inquiſition, or of an Indictment for the ſame Felony, if it be made out by Oath to the Satisfaction of the Court, that ſuch Informer is [q] dead, or unable to [r] travel, or kept [s] away by the Means or Procurement of the Priſoner, and that the Examination offered in Evidence is the very ſame [t] that was ſworn before the Coroner or Juſtice, without any Alteration whatſoever.

[a] H. P. C. 102, 262, 263, 264. State Trials, Vol. 1. fol. 265. Vol. 3. fol. 8, 9.

[b] Supra Ch. 15. Sect. 58, 59, 60, 61.

[c] Supra, ch. 15. Sect. 11, 12.

[d] State Trials, Vol. 1. f. 87, 181, 963. Francia's Trial. Kely. 18.

[e] 5 Mod. 164, 165. State Trials, Vol. 2. fol. 426. Vol. 3. fol. 131, 132.

[f] Dyer 215. pl. 50. H. P. C. 102, 193.

[g] Kely. 18, 19. State Trials, Vol. 3. fol. 8, 9. Vol. 4. f. 33. *See the contrary practiſed* State Trials, Vol. 1. *in Sir* Jervis Ellis's *Trial, and in* Throgmorton's *Trial*, fol. 49 *to* 56. *Duke of* Norfolk's *Trial*, fol. 73 *to* 85 *and* 97, 98. *Other Trials from* fol. 118 *to* 122. *Earl of* Eſſex's *Trial*, 167, 168. *Sir* Walter Raleigh's *Trial*, fol 177, 178, 181.

[h] Kely. 18. Supra, ch. 25. Sect. 142.

[i] 5 Mod. 165. Cont. State Trials, Vol. 1. fol. 53. Throgmorton's *Trial*.

[k] Kely. 55. H. P. C. 262, 263. 1 Lev. 180. Salk. 281 pl. 8. 2 Keb. 19. Vide Cro. El. 901. Dalt. ch 111, 112, 113.

[l] State Trials, Vol. 1. fol. 265. H. P. C. 262, 263. * H.P.C. 262, 263.

[m] Supra, ch. 9. Sect 31. 2 Jon 53.

[n] *See the Books above-cited; but* 2 Jon. 53. *'tis adjudged that Depoſitions before a Coroner may be read, but ſaid that thoſe taken before a Juſtice of Peace can in no Caſe be read.*

[o] Supra, ch. 15. Sect. 59, 60, 61.

[p] Supra, ch. 16. Sect. 11.

[q] Kely. 55. 1 Lev. 180. 2 Keb. 19 pl. 39. H P.C. 263.

[r] Kely. 55.

[s] Kely 55. *in* Harriſon's *Caſe*, State Trials, Vol. 3. f 941. *ſuch an Examination was read in Evidence, upon Proof that the Witneſs had been enticed away, tho' it did not directly appear to have been done by the Procurement of the Priſoner.*

[t] Kely 55. 2 Keb. 19. pl. 39. H P. C. 263.

Sect. 7. But it hath been [a] adjudged, That it is not ſufficient to authorize the Reading ſuch an Examination, to make Oath that the Proſecutors have uſed all their Endeavours to find the Witneſs, but cannot find him.

Sect. 8. Alſo it hath been [b] adjudged that Depoſitions taken before a Coroner upon an Inquiſition of Death *ſuper viſum corporis*, cannot be given in Evidence upon an Appeal for the ſame Death, becauſe it is a different Proſecution from that wherein they were taken.

Sect. 9. There are many [c] Inſtances in the Reigns of Queen *Elizabeth* and King *James* I. wherein the Depoſitions of abſent Witneſſes were allowed as Evidence in Treaſon and Felony, even where it did not appear but that the Witneſſes might have been produced *viva voce*. And it was adjudged in [d] the Earl of *Strafford*'s Trial, that where Witneſſes could not be produced *viva voce*, by Reaſon of Sickneſs, *&c.* their Depoſitions might be read for or againſt the Priſoner on a Trial of High Treaſon, but not where they might have been produced in Perſon. And it was admitted [e] in the Lord *Stafford*'s Trial, that the Depoſitions taken by a Witneſs before a Juſtice of the Peace might at the Priſoner's Deſire be read at the Trial, in order to take off the Credit of the Witneſs by ſhewing a Variance between ſuch Depoſitions and the Evidence given in Court *viva voce*. And for the ſame Reaſon it ſeems [f] agreed, That where a Witneſs at one Trial varies from his own Evidence at another in relation to the ſame Matter, ſuch Variance may alſo be given in Evidence to invalidate his Teſtimony at the ſecond Trial.

Sect. 10. But it is § ſaid to have been adjudged in the ſeventh Year of *Will.* 3. by the Court of King's Bench upon Advice with the Juſtices of the Common Pleas, upon an Indictment for a Libel, that Depoſitions taken before a Juſtice of Peace relating to the Fact could not be given in Evidence, tho' the Deponent were dead; and that the Reaſon why ſuch Depoſitions may be given in Evidence in Felony depends upon the Statutes of *Ph. & Ma.* And that this cannot be extended farther than the particular Caſe of Felony. But in the Report of this Caſe in 5 [g] *Mod.* it is ſaid that the Reaſon why ſuch Depoſitions could not be read was, becauſe the Defendant was not preſent, when they were taken, and therefore had not the Benefit of a Croſs Examination.

Sect. 11. However it was [h] agreed in Sir *John Fenwick*'s Caſe, That the Information of a Witneſs taken upon Oath before a Juſtice of Peace, being joined with the Evidence of one other Witneſs only *viva voce*, could not in the ordinary Courſe of Juſtice, amount to ſufficient Evidence within the 7th of *W.* 3. which requires two Witneſſes in High Treaſon; and therefore it was thought neceſſary to proceed in that Caſe by Bill of Attainder in Parliament, whoſe Power can be reſtrained by no Rules but thoſe of natural Juſtice.

Sect. 12. And in the ſame Caſe it was [i] agreed, That the Evidence given by a Witneſs at one Trial, could not in the ordinary Courſe of Juſtice be made uſe of, againſt a Defendant on the Death of ſuch Witneſs, at another Trial.

[a] Kely. 55.

[b] 2 Rol. Rep. 460, 461. Vide 1 Sid. 325. 2 Keb. 384. pl. 54.

[c] State Trials, Vol. 1. *Duke of* Norfolk's *Trial*, f. 84. Abington's *Trial*, f. 118, 119. Udal's *Trial*, fol. 148, 149. *Earl of* Eſſex's *Trial*, fol. 166. *Sir* Walter Raleigh's *Trial*, fol. 181, 182. *and the like was admitted in the Lord* Audley's *Caſe on an Indictment for a Rape on his own Lady.* State Trials, Vol. 1. fol. 268, 269.

[d] Ruſhw. Strafford, fol. 231, 526 *to* 531.

[e] State Trials, Vol. 2. fol. 622 *to* 627, 644, 647, 651. *See* Vol. 1. f. 911.

[f] State Trials, Vol. 2. f. 343, 344, 528, 529. *See* Sect. 12.

§ Salk. 286. Vide ſupra, Sect. 3.

[g] 5 Mod. 165. Vide Ruſhw. Strafford, 524 *to* 531. *and* State Trials, Vol. 2. fol. 420. *and* Vol. 4. fol. 261. *and* 2 Rol. Rep. 460, 461.

[h] State Trials, Vol. 4. f. 237, *&c.*

[i] State Trials Vol. 4. fol. 265 *to* 272. Vide ſupra Sect. 9. 1 Sid, 325. 2 Keb. 384. pl. 54.

Sect.

Sect. 13. Alſo it ſeems clear that Depoſitions taken in the Spiritual Court in a Cauſe of Divorce for a Forcible Marriage cannot * be given in Evidence upon an Indictment for ſuch Marriage on the [k] Statute of *H.* 7. 2.

* H.P.C. 263.

[k] Vide B. 1. ch. 42.

Sect. 14. As to the ſecond Particular, *viz.* How far Hearſay is Evidence: It ſeems [a] agreed, That what a [b] Stranger has been heard to ſay is in Strictneſs no Manner of Evidence either for or againſt a Priſoner, not only becauſe it is not upon Oath, but alſo becauſe the other ſide hath no Opportunity of a croſs Examination; and therefore it ſeems a ſettled Rule, That it ſhall never be made uſe of but only by way of Inducement [c] or Illuſtration of what is properly Evidence; yet it ſeems [d] that what the Priſoner hath been heard to ſay at another Time may be given in Evidence for him, as well as againſt [e] him, and alſo what a † Witneſs hath been heard to ſay at another Time, may be given in Evidence in order either to invalidate or confirm the Teſtimony which he gives in Court.

[a] State Trials, Vol. 2. f. 332, 414, 415, 761, 802, 803. Vol. 3. fol. 145, 210, 252. Vol. 4. f. 33.

[b] Vide ſupra, Sect. 3.

[c] State Trials, Vol. 2. f. 325, 328, 332, 333. 414, 415. Vol. 3. fol. 144, 145, 209, 210. Vol. 4. fol. 33.

[d] State Trials, Vol. 3. f. 254, 255.

[e] Vide ſupra, Sect. 3.

† State Trials, Vol. 2. fol. 529 802, 803. Vol. 3. fol. 218 to 222. 428, 429. Vol. 4. fol. 51, 52, 53.

Sect. 15. As to the third Particular, *viz.* whether Similitude of Hands be any Evidence in Criminal Caſes: It is obſervable that this with other Circumſtances in [f] *Algernoon Sydney*'s Caſe was ruled to be good Evidence of his having written a Paper charged againſt him as an Overt-act of High Treaſon: Yet in the Trial of the ſeven [g] Biſhops, the Court was divided in Opinion, whether Similitude of Hands were Evidence of the Defendants having ſigned the Paper charged againſt them as a Libel; and the Parliament having declared an Opinion in the Reverſal of *Algernoon Sydney*'s Attainder, that Compariſon of Hands is no Evidence of a Man's Hand-Writing in Criminal Caſes: It ſeems to have been generally holden [h] ſince that Time, that is not Evidence in any Criminal Caſe, whether capital or not capital.

Vide Supra, Sect. 9. & 12.

[f] State Trials, Vol. 3. f. 213, 216, 217, 226, 230.

[g] State Trials, Vol. 3. fol. 762 to 767.

[h] Vide State Trials, Vol. 3. fol. 892, 893 Vol. 4. fol 271, 272. *and* Francia's *Trial.*

As to the third Point, *viz.* who may be Witneſſes in criminal Caſes, I ſhall endeavour to ſhew,

1. Whether a Husband or Wife may be Witneſſes for or againſt one another.
2. Whether a Judge or Juror may be a Witneſs.
3. Where an Accomplice in the Crime charged againſt a Priſoner may be a Witneſs againſt him or for him.
4. Where a Perſon ſhall be diſabled to be a Witneſs in Reſpect of his having been attainted or convicted of a Crime.
5. Where it is a good Exception againſt a Witneſs that his Intereſt is concerned.
6. What other Exceptions are good againſt a Witneſs.

Sect. 16. As to the firſt of theſe Particulars, *viz.* Whether a Husband or Wife may be Witneſſes for or againſt one another: It ſeems [i] agreed, That the Husband and Wife being as one and the ſame Perſon in Affection and Intereſt, can no more give Evidence for one another in any Caſe whatſoever than for themſelves; and that regularly the one ſhall not be admitted to give Evidence againſt the other, nor the Examination of the one be made Uſe of againſt the other, by Reaſon of the implacable Diſſenſion which might be cauſed by it, and the great Danger of Perjury from taking the Oaths of Perſons under ſo great a Biaſs, and the extreme Hard-

[i] Co. Litt. 6. b. 2 Rol. Abr. 686. pl. 4. H.P.C. 263. 1 Brownl. 47. Hutton, 116. Raym. 1. 2 Keb. 403. pl. 12. State Trials, Vol. 4. fol. 608.

[a] Kely. 55.

Sect. 7. But it hath been [a] adjudged, That it is not ſufficient to authorize the Reading ſuch an Examination, to make Oath that the Proſecutors have uſed all their Endeavours to find the Witneſs, but cannot find him.

[b] 2 Rol. Rep. 460, 461. Vide 1 Sid. 325. 2 Keb. 384. pl. 54.

Sect. 8. Alſo it hath been [b] adjudged that Depoſitions taken before a Coroner upon an Inquiſition of Death *ſuper viſum corporis*, cannot be given in Evidence upon an Appeal for the ſame Death, becauſe it is a different Proſecution from that wherein they were taken.

[c] State Trials, Vol. 1. *Duke of* Norfolk's *Trial*, f. 84. Abington's *Trial*, f. 118, 119. Udal's *Trial*, fol. 148, 149. *Earl of* Eſſex's *Trial*, fol. 166. *Sir* Walter Raleigh's *Trial*, fol. 181, 182. *and the like was admitted in the Lord* Audley's *Caſe on an Indictment for a Rape on his own Lady.* State Trials, Vol. 1. fol. 268, 269.

[d] Ruſhw. Strafford, fol. 231, 526 to 531.

[e] State Trials, Vol. 2. fol. 622 to 627, 644, 647, 651. *See* Vol. 1. f. 911.

Sect. 9. There are many [c] Inſtances in the Reigns of Queen *Elizabeth* and King *James* I. wherein the Depoſitions of abſent Witneſſes were allowed as Evidence in Treaſon and Felony, even where it did not appear but that the Witneſſes might have been produced *viva voce*. And it was adjudged in [d] the Earl of *Strafford*'s Trial, that where Witneſſes could not be produced *viva voce*, by Reaſon of Sickneſs, *&c.* their Depoſitions might be read for or againſt the Priſoner on a Trial of High Treaſon, but not where they might have been produced in Perſon. And it was admitted [e] in the Lord *Stafford*'s Trial, that the Depoſitions taken by a Witneſs before a Juſtice of the Peace might at the Priſoner's Deſire be read at the Trial, in order to take off the Credit of the Witneſs by ſhewing a Variance between ſuch Depoſitions and the Evidence given in Court *viva voce*. And for the ſame Reaſon it ſeems [f] agreed, That where a Witneſs at one Trial varies from his own Evidence at another in relation to the ſame Matter, ſuch Variance may alſo be given in Evidence to invalidate his Teſtimony at the ſecond Trial.

[f] State Trials, Vol. 2. f. 343, 344, 528, 529. *See* Sect. 12.

[§] Salk. 286. Vide ſupra, Sect. 3.

Sect. 10. But it is [§] ſaid to have been adjudged in the ſeventh Year of *Will.* 3. by the Court of King's Bench upon Advice with the Juſtices of the Common Pleas, upon an Indictment for a Libel, that Depoſitions taken before a Juſtice of Peace relating to the Fact could not be given in Evidence, tho' the Deponent were dead; and that the Reaſon why ſuch Depoſitions may be given in Evidence in Felony depends upon the Statutes of *Ph. & Ma.* And that this cannot be extended farther than the particular Caſe of Felony. But in the Report of this Caſe in 5 [g] *Mod.* it is ſaid that the Reaſon why ſuch Depoſitions could not be read was, becauſe the Defendant was not preſent, when they were taken, and therefore had not the Benefit of a Croſs Examination.

[g] 5 Mod. 165. Vide Ruſhw. Strafford, 524 to 531. *and* State Trials, Vol. 2. fol. 420. *and* Vol. 4. fol. 261. *and* 2 Rol. Rep. 460, 461.

Sect. 11. However it was [h] agreed in Sir *John Fenwick*'s Caſe, That the Information of a Witneſs taken upon Oath before a Juſtice of Peace, being joined with the Evidence of one other Witneſs only *viva voce*, could not in the ordinary Courſe of Juſtice, amount to ſufficient Evidence within the 7th of *W.* 3. which requires two Witneſſes in High Treaſon; and therefore it was thought neceſſary to proceed in that Caſe by Bill of Attainder in Parliament, whoſe Power can be reſtrained by no Rules but thoſe of natural Juſtice.

[h] State Trials, Vol. 4. f. 237, *&c.*

Sect. 12. And in the ſame Caſe it was [i] agreed, That the Evidence given by a Witneſs at one Trial, could not in the ordinary Courſe of Juſtice be made uſe of, againſt a Defendant on the Death of ſuch Witneſs, at another Trial.

[i] State Trials Vol. 4. fol. 265 to 272. Vide ſupra Sect. 9. 1 Sid. 325. 2 Keb. 384. pl. 54.

Sect.

Sect. 13. Alſo it ſeems clear that Depoſitions taken in the Spiritual Court in a Cauſe of Divorce for a Forcible Marriage cannot * be given in Evidence upon an Indictment for ſuch Marriage on the [k] Statute of 3 *H.* 7. 2.

* H.P.C. 263.

[k] Vide B. 1. ch. 42.

Sect. 14. As to the ſecond Particular, *viz.* How far Hearſay is Evidence: It ſeems [a] agreed, That what a [b] Stranger has been heard to ſay is in Strictneſs no Manner of Evidence either for or againſt a Priſoner, not only becauſe it is not upon Oath, but alſo becauſe the other Side hath no Opportunity of a croſs Examination; and therefore it ſeems a ſettled Rule, That it ſhall never be made uſe of but only by way of Inducement [c] or Illuſtration of what is properly Evidence; yet it ſeems [d] that what the Priſoner hath been heard to ſay at another Time may be given in Evidence for him, as well as againſt [e] him, and alſo what a † Witneſs hath been heard to ſay at another Time, may be given in Evidence in order either to invalidate or confirm the Teſtimony which he gives in Court.

[a] State Trials, Vol. 2. f. 332, 414, 415, 761, 802, 803. Vol. 3. fol. 145, 210, 252. Vol. 4. f. 33.

[b] Vide ſupra, Sect. 3.

[c] State Trials, Vol. 2. f. 325, 328, 332, 333, 414, 415. Vol. 3. fol. 144, 145, 209, 210. Vol. 4. fol. 33.

[d] State Trials, Vol. 3. f. 254, 255.

[e] Vide ſupra, Sect. 3.

† State Trials, Vol. 2. fol. 529, 802, 803. Vol. 3. fol. 218 to 222. 428, 429. Vol. 4. fol. 51, 52, 53.

Sect. 15. As to the third Particular, *viz.* whether Similitude of Hands be any Evidence in Criminal Caſes: It is obſervable that this with other Circumſtances in [f] *Algernoon Sydney*'s Caſe was ruled to be good Evidence of his having written a Paper charged againſt him as an Overt-act of High Treaſon: Yet in the Trial of the ſeven [g] Biſhops, the Court was divided in Opinion, whether Similitude of Hands were Evidence of the Defendants having ſigned the Paper charged againſt them as a Libel; and the Parliament having declared an Opinion in the Reverſal of *Algernoon Sydney*'s Attainder, that Compariſon of Hands is no Evidence of a Man's Hand-Writing in Criminal Caſes: It ſeems to have been generally holden [h] ſince that Time, that is not Evidence in any Criminal Caſe, whether capital or not capital.

Vide Supra, Sect. 9 & 12.

[f] State Trials, Vol. 3. f. 213, 216, 217, 226, 230.

[g] State Trials, Vol. 3. fol. 762 to 767.

[h] Vide State Trials, Vol. 3. fol. 892, 893 Vol. 4. fol 271, 272. *and* Francia's *Trial.*

As to the third Point, *viz.* who may be Witneſſes in criminal Caſes, I ſhall endeavour to ſhew,

1. Whether a Husband or Wife may be Witneſſes for or againſt one another.
2. Whether a Judge or Juror may be a Witneſs.
3. Where an Accomplice in the Crime charged againſt a Priſoner may be a Witneſs againſt him or for him.
4. Where a Perſon ſhall be diſabled to be a Witneſs in Reſpect of his having been attainted or convicted of a Crime.
5. Where it is a good Exception againſt a Witneſs that his Intereſt is concerned.
6. What other Exceptions are good againſt a Witneſs.

Sect. 16. As to the firſt of theſe Particulars, *viz.* Whether a Husband or Wife may be Witneſſes for or againſt one another: It ſeems [i] agreed, That the Husband and Wife being as one and the ſame Perſon in Affection and Intereſt, can no more give Evidence for one another in any Caſe whatſoever than for themſelves; and that regularly the one ſhall not be admitted to give Evidence againſt the other, nor the Examination of the one be made Uſe of againſt the other, by Reaſon of the implacable Diſſenſion which might be cauſed by it, and the great Danger of Perjury from taking the Oaths of Perſons under ſo great a Biaſs, and the extreme Hard-

[i] Co. Litt. 6. b. 2 Rol. Abr. 686. pl. 4. H.P.C. 263. 1 Brownl. 47. Hutton, 116. Raym. 1. 2 Keb. 403. pl. 12. State Trials, Vol. 4. fol. 608.

Hardſhip of the Caſe: And therefore it hath been [a] adjudged, That the Husband cannot be a Witneſs againſt the Wife, nor the Wife againſt the Husband, to prove the firſt Marriage on an Indictment on the Statute of 1 [b] *Jac.* 1. 11. for a ſecond Marriage. Yet [c] ſome Exceptions have been allowed to this general Rule in Caſes of evident Neceſſity, as in the Lord [d] *Audley*'s Caſe, who held his Wife's Hands and Legs while his Servant, by his Command, raviſhed her; or where a Man is indicted for a [e] Forcible Marriage againſt the [f] Purport of 3 *H.* 7. or where either a Husband or Wife have Cauſe to demand [g] Sureties of the Peace againſt the other, *&c.*

Sect. 17. As to the ſecond Particular, *viz.* Whether a Judge or Juror may be a Witneſs: It ſeems [h] agreed, That it is no Exception againſt a Perſon's giving Evidence either for or againſt a Priſoner, that he is one of the Judges or Jurors who are to try him. And in the Caſe of [i] *Hacker*, two of the Perſons in the Commiſſion for the Trial came off from the Bench, and were ſworn and gave Evidence, and did not go up to the Bench again during his Trial.

Sect. 18. As to the third Particular, *viz.* Where an Accomplice in the Crime charged againſt a Priſoner may be a Witneſs againſt him or for him: It has been long ſettled [k], That it is no Exception againſt a Witneſs that he hath confeſſed himſelf guilty of the ſame Crime, if he have not been [l] indicted for it; for if no Accomplices were to be admitted as Witneſſes, it would be generally impoſſible to find Evidence to convict the greateſt Offenders. Alſo it hath been often [m] ruled, That Accomplices who are indicted, are good Witneſſes for the King until they be convicted. Alſo it hath been [n] adjudged, That ſuch of the Defendants in an Information againſt whom no Evidence is given, may be Witneſſes for the others. It hath been alſo [o] adjudged that where *A. B.* and *C.* are ſued in three ſeveral Actions on the Statute for a ſuppoſed Perjury in their Evidence concerning the ſame Thing, they may be good Witneſſes in ſuch Actions for one another.

Sect. 19. As to the fourth Particular, *viz.* Where a Perſon ſhall be diſabled to be a Witneſs in Reſpect of his having been attainted or convicted of a Crime: It ſeems agreed, That a Conviction, and therefore a *fortiori* an Attainder, or Judgment of [p] Treaſon, [q] Felony, [r] Piracy, [s] *Præmunire* or † Perjury, or of Forgery [u] on 5 *Eliz.* and alſo a [x] Judgment in Attaint for giving a falſe Verdict, or in Conſpiracy at the Suit of [y] the King, and alſo [z] Judgment for any * Crime whatſoever to ſtand in the Pillory, or to be whipt or branded, being in a Court which had a ¶ Juriſdiction, are good Cauſes of Exception againſt a Witneſs, while they continue in force.

[a] Raym. 1. *and the ſame Point was admitted in* Fielding's *Trial* State Trials, Vol. 4 f. 754

[b] Vide B. 1. Ch. 43.

[c] *In* Raym. 1. *There is an Opinion that a Husband and Wife may be Witneſſes againſt one another in Treaſon, but the contrary is adjudged,* 1 Brownl. 47. *See* 2 Keb 403.

[d] State Trials, Vol. 1. f. 265, 269. Hutt. 116. Ruſhw. Collections, part 2. Vol. 1. fol. 94, 99.

But this Caſe is denied to be Law Raym 1.

[e] Cro. Ca. 488. State Trials, Vol. 4. fol. 588.

3 Keb 193. pl. 43.

[f] *See* B. 1. ch. 42.

[g] *See* B 1. ch. 60. Sect. 4. Hutt. 116.

[h] State Trials, Vol. 2. fol. 257, 632, 674. Kely 12. 1 Syd. 133. pl. 6.

[i] Kely. 12.

[k] State Trials, Vol. 1 f. 96, 696, 697, 723. Vol. 2. fol. 334, 501. Vol. 3. fol. 161, 217, *&c.* 595, 668, 669. *and* Bracton Vol. 4. f. 12. Trials per Kely. 33. [q] 32. infra, §. ſupra, Ch. 43. *cannot be a* Vide ſupra, *one attaint of* 2 Salk. 689. *ſeem to make* Mod. 15, 16, 75, 76 *Nature of the*

Vol. 4. fol. 12, 33. *See* Hale's *Opinion to the contrary* arguendo. State Trials, Vol. 1. fol. 724. 118. b. [l] State Trials, Vol. 1. fol. 96. Vol. 2. fol. 501. [m] State Trials, Vol 1. fol. 966. Kely. 17, 18. 3 Keb. 136. pl. 70. Vide Vol. 1. fol. 697. [n] 1 Sid. 237. pl. 4. Vide pais, 148. Style 401. 12 Aſſ. 12. Savil 34. [o] 2 Rol. Abr. 685. pl. 3. [p] 5 Mod. 16. Raym. 369. Co. Litt. 6. b. 2 Bulſt. 154. [r] 2 Roll. Abr. 686. H. 2. 3. [s] Co. Litt. 6 b. † Raym. Sect. 22, 23. Supra Ch. 37. Sect. 52. Co. Lit. 6. b. H. P. C. 263. [u] Co. Litt. 6. b. Vide Sect. 25. 33 H. 6. 55. pl. 45. *But* H. P. C. 263. *'tis ſaid in general that one attaint of Forgery Witneſs.* [x] Co. Litt. 6. b. 2 Roll. 684. pl. 4. [y] 33 H 6. 55. pl. 45. 24 E. 3. 34. pl. 34. Ch. 43. Sect. 25. B 1. ch. 72. Sect. 9. Co. Litt. 6. b *But* H. P. C. 263. *'tis ſaid in general that Conſpiracy cannot be a Witneſs.* [z] *That it is not material whether ſuch Judgment were actually executed.* 3 Inſt. 219. 3 Lev. 426. *But* Co. Litt. 6. b. Kely. 37, 38. H. P. C. 263. 5 Mod. 75, 76. *the Execution of the Judgment material* * 2 Salk 689. 3 Lev. 426. *This Point is made a Quære* 5 *And it is ſaid that by the Civil and Canon Law no ſuch Judgment diſables a Witneſs, unleſs the Crime be infamous.* 3 Lev. 426, 427. ¶ 1 Sid. 51. pl. 16, Raym. 32.

Sect.

Sect. 20. But it is || agreed, That no such Conviction or Judgment can be made use of to this Purpose, unless the Record be actually produced in Court. Also it is a general Rule that a ** Witness shall not be asked any Question the answering to which might oblige him to accuse himself of a Crime; and that his Credit is to †† be impeached only by general Accounts of his Character and Reputation, and not by Proofs of particular Crimes, whereof he never was convicted.

Sect. 21. It seems clear [a] at this Day, That Outlawry in a personal Action is not a good Exception against a Witness, as it is against a Juror. And that a Person convicted of Felony, who is admitted to his Clergy and [b] burnt in the Hand, is thereby re-enabled to be a Witness.

Sect. 22. It seems [c] agreed, That the King's Pardon of Treason or Felony after a Conviction or Attainder, restores the Party to his Credit: Also it was holden by the late Chief Justice [d] *Holt*, That the King's Pardon will remove a Man's Disability to be a Witness in all Cases whatsoever, wherein it is only the Consequence of the Conviction or Judgment against him, and not an express Part of the Judgment, as it is in Conspiracy [e] at the Suit of the King, and in Perjury on the Statute. But this Matter [f] seems not to be fully settled.

Sect. 23. It hath been [g] ruled, That a Conviction of Perjury doth not disable a Man from making an Affidavit in Relation to the Irregularity of a Judgment.

Sect. 24. As to the fifth Particular, *viz.* Where it is a good Exception against a Witness that his Interest is concerned: It seems an uncontested [h] Rule, in all Cases whatsoever, That it is a good Exception against a Witness, that he is either to be a Gainer or Loser by the Event of the Cause; whether such Advantage be direct and immediate, or consequential only. And this seems to be the Reason why he who is Bail for the Defendant, [i] cannot be an Evidence for him without Consent. Also upon the same Ground it is [k] agreed, That he who borrows Money upon an usurious Contract, cannot be a Witness upon an Information for the Usury (unless he [l] hath paid the Money) whether such Information be brought by himself or any other; for if in such Case a Man might be a Witness, he would in Effect swear for himself, by proving a Matter which may avoid his own Contract. And upon the like Reason it hath been [m] ruled, That he who by a Slight has been imposed upon to set his Hand to a Note for more Money than he intended, is no good Witness on an Information for the Cheat; because a Conviction may be a Means to avoid the Note, by being made use of by the Party when sued upon it as a Motive to influence the Jury, which cannot well be prevented, tho' in Law it be no [n] Evidence. And for the like Reason I take it to be generally * agreed, That he whose Property may be prejudiced by a Forgery, is no Evidence to prove it on an Indictment or Information. And if it be a Forgery within 5 *Eliz.* a farther Reason may be offered why such a Person cannot be an Evidence because he may have an Action on the Statute; and upon this Reason alone it hath been [o] adjudged, That he against whom a Verdict is given, cannot be a Witness to prove Perjury in the Evidence. And yet it appears from daily Experience, That [p] a Person beaten, and generally any other Person to whose [q] Damage a criminal Information concludes, is a

|| State Trials, Vol. 1. f. 268. Vol. 2. f. 307, 436, 445. Vol. 3. f. 425. Vol. 4. f. 130.

** State Trials, Vol. 2. f. 268, 472. Vol. 3. f. 387, 1010. Vol. 4. f. 44. Cont. Rushw. Strafford, 605. & *ibid.* 558. *one was not admitted to speak to clear himself.*

†† State Trials, Vol. 3. f. 256, 257, 680. Vol. 4. f. 129. 130. Vide Vol. 2. fol. 151, 267, 297.

[a] Co. Lit. 6 b. *But* 33 H. 6. 32. pl. 2. *taken Notice of*, 2 Rol. Abr. 675. pl. 4. *seems contrary.*

[b] Supra, Ch. 33. Sect. 129. Ch. 37. S. 49.

[c] Supra, Ch. 37. Sect. 48, 49, 50.

[d] 2 Salk. 514, 689. *But see* 2 Brow. 47.

[e] 1 Ch. 72. Sect. 9.

[f] Vide supra, Ch. 37. Sect. 52.

[g] 2 Salk. 461. pl. 3.

[h] Co. Lit. 6. 1 Sid. 237. pl. 5. 1 Keb. 836. pl. 17.

[i] State Trials, Vol. 3. fol. 253.

[k] Co. Lit. 6. b. 2 Rol. Abr. 685. pl. 2. 1 Raym. 191. Vide 2 Keb. 384. pl. 54.

[l] 1 Salk. 283. *Yet between the King and* Paris, 1 Sid. 431. 2 Keb. 572. pl. 84.

[m] 1 Salk 283. *for granted.* 2 Keb. 572. pl. 84.

[n] 1 Salk 283. pl. 12. 1 Sid. 325. * Salk. 283. pl. 12. [o] 2 Rol. Ab. 685. pl. 4. *and the same Point is taken* 1 Sid. 237. pl. 5. 1 Keb. 836. pl. 17. Vide 1 Salk 283. pl. 12. [p] 2 Rol. Ab. 685. pl. 5. 2 Keb. 384. pl. 54. 572. pl. 84. [q] 1 Sid. 237. pl. 5. 2 Keb. 384. pl. 54. 572. pl. 84. 1 Keb. 836. pl. 17. 1 Salk. 286. pl. 20. 1 Sid. 211. pl. 8. 1 Vent. 49. *the contrary was ruled in a stronger Case, by* 3 *Judges against the Opinion of* Twysden.

good Evidence to prove such Battery or other Misdemeanor, notwithstanding the Objection that he may have an Action. And therefore, upon the Whole, the Rules of Evidence concerning this Matter seem not to be clearly settled.

Sect. 25. It seems [a] agreed, That it is no good Exception against a Witness, That he has a Maintenance from the King; for every one may maintain his own Witnesses. Also it hath been [b] adjudged to be no good Exception against a Witness, That he has received a Reward for having made a Discovery of the Crime to be proved against the Prisoner. Also it hath been [c] ruled to be no good Exception, That a Witness hath the Promise of a Pardon or other Reward on Condition of giving his Evidence, unless such Reward be promised by way of Contract for giving such and such particular Evidence, or full Evidence, or any way in the least to bias him to go beyond the Truth; which not being easily avoided in Promises or Threats of this Kind, it is certain that too great Caution cannot well be used in making them.

Sect. 26. As to the sixth Particular, *viz.* What other Exceptions are good against a Witness: It seems [d] agreed to be a good Exception, That a Witness is an Infidel; that is, as I [e] take it, That he believes neither the Old nor New Testament to be the Word of God, on one of which our Laws require the Oath should be administred.

Sect. 27. Also it is [f] certain, That want of Discretion is a good Exception against a Witness; on which Account alone it [g] seems that an Infant may be excepted against; for in some Cases an Infant of nine Years of Age has been allowed to give Evidence.

Sect. 28. But it seems agreed, That it is no good [h] Exception against a Witness that he is an Alien, or Villain, or Bondman, *&c.*

Sect. 29. As to the fourth Point, *viz.* In what Manner the Witnesses for the Defendant are to give their Evidence: It hath always been [i] agreed, That the Evidence for the King must in all Cases be upon Oath, and also that the Evidence for the Defendant in an [k] Appeal, whether capital or not capital, or in an Indictment or Information for a [l] Misdemeanour, must also be upon Oath. And it is said by Sir *Edward* [m] *Coke*, *That we never read in any Statute, ancient Author, Book-case or Record, that in criminal Cases the Party accused should not have Witnesses sworn for him, and therefore that there is not so much as* scintilla juris *against it.* And it is said by Sir [n] *Matthew Hale*, That there is no known Law against it. However there having been a constant immemorial [o] Practice not to suffer Witnesses to be sworn against the King upon Indictments of capital Crimes, * except in some Cases specially provided for by Statute; and the Judges being always tender of departing from the settled Practice of their Predecessors, and generally choosing rather to presume it originally founded on some Statute or other good Foundation, than to suffer the Reasonableness of it to be nicely inquired into, which might be an Inlet to endless Uncertainties, it was thought necessary to enact by 1 *Annæ* 9. *Par.* 3. *That after the twelfth of* February 1702. *every Person who shall be produced or appear as a Witness on the Behalf of the Prisoner, before he or she be admitted to depose, or give any Manner of Evidence, shall first take an Oath to depose the Truth, the whole Truth, and nothing but the Truth, in such Manner as the Witnesses for the Queen are by Law obliged to do; and if convicted of any wilful Perjury in such Evidence, shall suffer all the Punishments, Penalties, Forfeitures, and Disabilities, which by any of the Laws and Statutes of this Realm, are or may be inflicted upon Persons convicted of wilful Perjury*

[a] State Trials, Vol. 2. f. 334, 335, 691, 693.
[b] State Trials Vol. 1. f. 723, 724. Vol. 2. f. 334, 335. Vol. 4. fol. 121. Kely. 18.
[c] Kely. 18. State Trials, Vol. 2. f. 334, 335, 693. V. 3. f. 221, 222. *But Sir Matthew Hale of a different Opinion.* Kely. 18. Vide State Trials, Vol. 4. fol. 121.
[d] Co. Lit. 6. State Trials, Vol. 4. f. 131.
[e] Vide Trigls per pais, 165.
2 Keb. 314. pl. 23.
[f] Co. Lit. 6.
[g] H. P. C. 263.
1 Brownl 47.
[h] State Trials, Vol. 1. f. 253.
[i] H. P. C. 264
2 Bulst. 147.
[k] State Trials, Vol. 2. f. 737.
1 Sid. 325.
[l] 1 Sid. 211.
[m] 3 Inst. 79.
[n] H. P. C. 264.
[o] Cro. Ca. 292.
2 Bulst. 147. State Trials, Vol. 1. f. 55. 148. Vol. 2. fol. 296, 737. H. P. C. 264.
* Vide 31 El. Ch. 4. 4 Jac. ch. 1.

Sect. 30. As to the fifth Point, *viz.* Whether a Defendant in criminal Cases have Right to Proceſs to bring in his Witneſſes: I take it that in Proſecutions for * Miſdemeanours the Defendant may take out *Subpœna's* of Courſe, but that in Capital Caſes he hath no [b] Right by the Common Law to any Proceſs againſt his Witneſſes without a [c] ſpecial Order of the Court. But it is enacted by 7 *W.* 3. 3. *Par.* 7. *That all Perſons Perſons accuſed and indicted for any High Treaſon, whereby any Corruption of Blood may enſue, ſhall have the like Proceſs of the Court where they ſhall be tried, to compel their Witneſſes to appear for them at any ſuch Trial or Trials, as is uſually granted to compel Witneſſes to appear againſt them.* And it ſeems that ſince the Statute of 1 *Annæ* 9. let forth more at large in the precedent Section, which ordains, That the Witneſſes for the Priſoner ſhall be ſworn, Proceſs may be taken out againſt them of courſe in any Caſe whatſoever.

* State Trials, Vol. 1. f. 969. Vol. 3 f. 238. 252, 420.

[b] Vide State Trials, Vol. 1. f. 969. Vol 3. f. 1002, 1003.

[c] *But in* Turner's *Caſe*, State Trials, Vol 1 f. 995. *'Tis ſaid that the Court can't grant the Priſoner any Precept to bring in his Witneſſes.* &c.

Sect. 31. As to the ſixth Point, *viz.* What Evidence maintains an Indictment, *&c.* Having already ſhewn, *Ch.* 25, *Sect.* 117. and *Book* 1. *Ch.* 30. *Sect.* 9. That according to the later Opinions, where one is indicted upon a Statute, and the Evidence doth not bring the Caſe within the Statute, but yet proves the Offence in the Indictment as it is an Offence at the Common Law, the Defendant may be found guilty at the Common Law, and the Words *contra formam Statuti* rejected as Surplus; having alſo ſhewn, *Ch.* 35. *Sect.* 11. That it is ſtrongly holden that a Man cannot be found Guilty of an Indictment againſt him as Principal, upon Evidence which only proves him to have been Acceſſory before, but ſhall be diſcharged of the Indictment; I ſhall in this Place take Notice only of the following Particulars.

Sect. 32. *Firſt*, That it is a ſettled Rule [d] in all Caſes, whether capital or not capital, That the Day laid in the Indictment or [e] Appeal is not material upon Evidence, but that the Defendant may be convicted upon Proof of a Fact at any other Time, whether before or after the Day laid; ſo [f] that it were before the Time when the Indictment or Appeal were preferred. And agreeably hereto Sir [g] *Henry Vane* was found guilty of an Indictment of High Treaſon laid on the 30th of *May* 11 *Car* 2. upon Evidence of a Fact done the 30th of *January*, 1 *Car.* 2.

[d] H. P. C. 264. 3 Inſt. 230. 1 Salk. 288. Kely. 16. 2 Inſt. 318, 319. State Trials, Vol. 4. fol. 9.

[e] H.P.C. 187.

[f] 1 Salk. 288. State Trials, Vol. 4. f. 9.

Sect. 33. *Secondly*, That where the Time proved varies from that laid in the Indictment or Appeal the Jury [§] may either find the Defendant guilty generally, in which Caſe the Forfeiture ſhall relate to the Time laid, till the Verdict be falſify'd by the Party intereſted, (as it may be in this [h] Reſpect, tho' not as to the Point of the Offence,) or they may [i] Specially find him Guilty on the Day on which the Fact is proved, whether before or after the Day laid in the Indictment or Appeal, in which Caſe the Forfeiture ſhall relate to the Day ſo ſpecially found. But where a Verdict expreſsly finds a Defendant guilty before the Time laid in the Indictment or Appeal, whether it may be falſified, as to the Time, by the Party intereſted, as it may be where it finds him guilty generally of the Offence in the Indictment or Appeal, upon Evidence of a Fact after the Time laid, may deſerve to be conſider'd.

[§] 3 Kely. 16.

* H. P. C. 264. 2 Inſt. 318. 3 Inſt. 230,

[h] H.P.C.264, 270. 3 Inſt. 230. *and* infra, *in Chapter* 51.

[i] Kely. 16. H. P. C. 264. 2 Inſt. 318. 3 Inſt. 230.

Sect. 34. *Thirdly*, That where a certain [k] Place is made Part of the Deſcription of the Fact which is charged againſt the Defendant, the leaſt Variance as to ſuch Place between the Evidence and Indictment is fatal; as where a Treſpaſs in taking away Goods, or any other Offence is alledged in ſuch a Pariſh in the Houſe of *J. S.* or in ſuch a Pariſh in a Play-Houſe in *Lincoln's-Inn-Fields*, and upon Evidence it appear to have been done at the Houſe of a different Perſon, or that there is no Play-Houſe in *Lincoln's-Inn-Fields*. But it is a ſettled [l] Rule, That a Place laid

[k] Salk. 385, 661.

[l] H. C. C. 264, 265. Salk. 288. State Trials, Vol. 4. f. 9. Kely. 15, 33.

laid only for a Venue in an Indictment or Appeal is no way material upon Evidence; but that a Proof of the ſame Crime at any other Place in the [a] ſame County, maintains the Indictment or Appeal as well as if it had been proved in the very ſame Place. Alſo it hath been [b] adjudged, That after a Crime hath been proved in the County in which it is laid, Evidence may be given of other Inſtances of the ſame Crime in another County, in order to ſatisfy the Jury. Alſo it was [c] adjudged in Sir *Henry Vane*'s Caſe, That where one is indicted for High Treaſon in compaſſing the King's Death in the County of *M.* and the levying of War in the ſame County is laid as an Overt-Act of ſuch Treaſon, and [c] proved in the ſame County by one Witneſs, the levying of War in another County may alſo be proved by another Witneſs. But it ſeems to have been [d] agreed at the ſame Time, That where the levying of War is the Treaſon for which the Party is indicted, it muſt be fully proved in the County in which it is laid. Alſo it ſeems, That at this Day the levying of War can in no Caſe be given in Evidence as an Overt-Act in any County in which it is not laid, unleſs it tend to prove ſome Overt-Act that is expreſsly laid; for it is enacted by 7 *Wil.* 3. 3. *Par.* 8. *That no* [e] *Evidence ſhall be admitted or given of any Overt-Act that is not expreſsly laid in the Indictment againſt any Perſon or Perſons whatſoever.* In the Conſtruction whereof it hath been [f] adjudged, That where one is indicted for High Treaſon in adhering to the King's Enemies, and certain Acts of Hoſtility done by him in a certain Ship called the *Clencarty*, are laid as the Overt-Acts of ſuch Adherence, no Evidence can be given of any other diſtinct Act of Adherence, having no Relation to, nor any way tending to prove, what was done in the *Clencarty*, tho' it conduce to prove the ſame Species of Treaſon; and therefore that on ſuch an Indictment no Evidence can be given of the Priſoner's having run away to the Enemy in a Cuſtom-Houſe boat, *&c.* But it hath been [g] adjudged, That where one is indicted for High Treaſon in compaſſing the King's Death, and a Conſult and Agreement to aſſaſſinate the King is laid as one of the Overt-Acts of ſuch Treaſon, the Defendant's giving about among the Conſpirators a Liſt of the Perſons Names who were intended to be employed in the Aſſaſſination, may be given in Evidence againſt him upon ſuch Indictment, becauſe it naturally rends to prove his Agreement to the intended Aſſaſſination, which Agreement is one of the Overt-Acts laid in the Indictment. Alſo it hath been been [h] adjudged, That where the writing of ſeveral treaſonable Letters is laid as an Overt-Act of High Treaſon in Compaſſing the King's Death, and the Purport of ſuch Letters is only ſet forth in the Indictment without a particular Recital or Deſcription of any of them, the particular Letters making good ſuch Charge may be read at the Trial.

Sect. 35. *Fourthly*, That where ſeveral Overt-Acts are laid in an Indictment of High Treaſon, the Proof of any [i] one of them maintains the Indictment as much as if every one of them were proved.

Sect. 36. *Fifthly*, That where one is indicted for writing a [k] Libel *ſecundum tenorem ſequentem*, or for forging a Deed ſo and ſo deſcribed, any the leaſt Variance between the Libel recited or Deed deſcribed, and thoſe given in Evidence, is fatal; but that where the Subſtance only of a Libel is ſet forth in *Latin*, it is ſufficient if the Libel be proved to have the ſame Senſe as is ſet forth. Yet it ſeems [l] agreed, That it is no Evidence in any criminal Caſe, that the Defendant ſaid ſo and ſo, or Words to the like Effect; becauſe the Court muſt know the very Words to judge of their Force and Effect.

Sect.

[a] *See the Books above-cited, and* Supra, ch. 25. Sect. 34 *to* 52. *and* Cro. Eliz 911.
[b] Kely. 33.
[c] Kely. 14, 15. State Trials, Vol. 1. f. 932. Vol. 2. f. 317, 776, 785. Vide Vol. 1. f. 843. Vol. 4. f. 78.
[c] *For it is neceſſary that ſome Overt-act be proved in the ſame County; for otherwiſe the compaſſing cou'd no way be ſaid to be proved in the County wherein it is laid. See the Books above-cited.*
[d] Kely. 15.
[e] Vide State Trials, Vol. 1. f. 843.
[f] State Trials Vol. 4. f. 331, 332, 333.
[g] State Trials, Vol. 4. f. 124, 125, 132, 133, 134.
[h] Francia's Trial. Vide Vol. 1. fol. 617, 950. Vol. 2. f. 98, 99, 112, &c. 322, 323. Vol 3. f. 857, 1009. *Yet in ſome Indictments the very Words charged to have been treaſonable have been ſet forth.* State Trials, Vol. 2. fol. 746. Vol. 3. fol. 204, 219.
[i] State Trials, Vol. 1. f. 843, 851. V. 2. fol. 430. Vol. 4. f. 159.
[k] Salk 660, 661. Hob. 272.
[l] Hob. 294.

Sect. 37. *Sixthly*, That a Variance between an Indictment or Appeal of Death, and the Evidence as to the inſtrumental Cauſe mentioned in ſuch Indictment or Appeal, is no [a] way material, ſo that the Party be proved to have died by the ſame kind of Death as is alledged in the Indictment or Appeal. And therefore it is [b] agreed, That if one be indicted or appealed for killing another with a Sword, and upon Evidence it appear that he killed him with a Staff, Hatchet, Bill or Hook, or any other Weapon with which a Wound may be given, he ought to be found guilty; for the Subſtance of the Matter is, whether he gave the Party a Wound of which he died, and it is not material with what Weapon he gave it, tho' for Form's ſake it be [c] neceſſary to ſet forth a particular Weapon. And on the ſame Ground it hath been alſo [e] adjudged, That an indictment, or Appeal for poiſoning a Man with one kind of Poiſon, may be maintained by Evidence of a different kind of Poiſon; for the Subſtance of the Matter is whether the Defendant did poiſon the Deceaſed or not. [f] Yet it ſeems clear, That Evidence of poiſoning, burning, or famiſhing, or any other kind of killing wherein no Weapon is uſed, will not maintain an Indictment or Appeal of Death by killing with a Weapon; and that Evidence of killing with a Weapon will not maintain an Indictment or Appeal of Poiſoning, *&c.* becauſe they are different Kinds of Deaths; and in like Manner that an Indictment of Treaſon could [g] never be maintained by Evidence of Treaſon of a different Species.

Sect. 38. *Seventhly*, That it ſeems a [h] general Rule, That whereever a Variance between an Indictment or Appeal, and the Evidence brought to ſupport them, is material or immaterial in Reſpect of the Principal; in the ſame Caſes alſo it will be material or immaterial in Reſpect of the Acceſſary.

Sect. 39. *Eighthly*, That it is [i] ſettled at this [k] Day, That if an Indictment or Appeal againſt *A. B.* and *C.* for the Death of *D.* charge *A.* as having given the mortal Blow, and *B.* and *C.* as having been preſent, procuring and abetting, and the Evidence prove that *B.* and *C.* gave the Blow, and that *A.* was only preſent procuring and abetting; yet it maintains the Indictment, becauſe in ſuch a Caſe in the [k] Judgment of Law, the Act of any of them is the Act of all.

Sect. 40. *Ninthly*, That it hath been [l] reſolved, That if one be indicted as Acceſſary to two, and upon Evidence appear to have been Acceſſary to one of them only, yet he ſhall be found guilty. But it is [m] holden by Sir *Edward Coke*, That if an Appeal be brought againſt two as Principals, and againſt another as Acceſſary to them, and one of thoſe charged as Principals be found not guilty, the Acceſſary is diſcharged, for which he gives this Reaſon, That becauſe the Plaintiff made him Acceſſary to two, he cannot be found Acceſſary to one. But no Authority is cited for the Maintenance of this Opinion; neither doth it ſeem eaſy to reconcile it with the Reſolution above-mentioned, unleſs the Rules of Evidence on an Appeal differ from thoſe on an Indictment, which I do not [n] find that they do as to other Variances.

[a] 9 Co. 67. 2 Inſt. 319. 3 Inſt. 135. H. P. C. 265.
[b] *See the Books above-cited, and* ſupra Ch. 23. Sect. 84.
[c] Vide ſupra, Ch. 23. S. 84.
[d] 3 Inſt. 135. H. P. C. 265. 3 Inſt. 319.
[e] H. P. C. 265. 2 Inſt. 319.
[f] State Trials Vol 4. f. 9.
[g] H. P. C. 265. 3 Inſt. 165.
[h] *But there were anciently ſome Opinions to the contrary.* Supra Ch. 29. Sect. 9. Lett. x. S. P. C. 41. Lett. A. B.
[i] Plow Com. 98, 100, a. 1 Salk. 334, 335. 3 Mod. 121. 9 Co. 67. b. 4 H. 7. 18. pl. 10. *Abridged* Fitz. Coro. 60. Bro. Appeal, 85. Coro. 140 *or* 141, S. P. C 41. Lett. A. B. Supra, Ch. 23. Sect. 76. Ch. 25. Sect. 66.
[k] *See the Books above-cited, and* B. 1. Ch. 32. Sect. 6. 9 Co. 119. a.
[l] Vide ſupra, Ch. 31. Sect. 31. *and* 50. H. P. C. 222, 265. Sect. 32, 34, 37, 38. 39. Ch. 34. Sect. 7. Ch. 38. Sect. 8, 9. Ch. 41. Sect. 6. 1 9 Vide Keilw. 107. *and* ſupra, Ch. 29. Sect. 46, 47.
[m] 2 Inſt. 183.
[n] Vide ſupra,

Sect. 41. *Tenthly*, That it hath been [o] agreed, That if a Person be generally indicted for the Murder of another *ex malitia præcogitata*, and no expreſs Malice appear upon the Evidence but only [p] Malice implied by Law, yet he ſhall be found guilty. Alſo it hath been [q] adjudged, That where an Indictment ſets forth all the ſpecial Matter in Reſpect whereof the Law implies Malice, a Variance between the Indictment and Evidence as to the Circumſtances doth no Hurt, ſo that the Subſtance of the Matter be found. As [a] where an Indictment for the Murder of a Serjeant of Mace in *London* upon an Arreſt, ſuppoſes that the Sheriff made a Precept to ſuch Serjeant for the Arreſt, and upon the Evidence it appears that there was not any ſuch Precept, but that the Serjeant made the Arreſt *ex Officio* at the Plaintiff's Requeſt upon the Entry of the Plaint, according to the Cuſtom of the City; for the Subſtance of the Matter is whether the Defendant killed an Officer in the lawful Execution of legal Proceſs.

Sect. 42. *Eleventhly*, That violent [b] Preſumption from plain Circumſtances is in ſome Caſes taken for full Proof; as where a Man is ſtabbed in a Houſe, and another runs out with a bloody Knife in his Hand, and no one elſe is in the Houſe at the Time; alſo it is [c] ſaid, That a probable Preſumption is of ſome Weight, but that a light one is not to be regarded at all.

Sect. 43. *Twelfthly*, That it is enacted by 21 *Jac.* 27. *That if any Woman be delivered of any Iſſue of her Body, Male or Female, which being born alive ſhould by the Laws of this Realm be a Baſtard, and that ſhe endeavour privately, either by drowning, or ſecret burying thereof, or any other way, either by herſelf or the procuring of others, ſo to conceal the Death thereof, as that it may not come to light, whether it were born alive or not, but be concealed; in every ſuch Caſe, the ſaid Mother ſo offending ſhall ſuffer Death as in Caſe of Murder, except ſuch Mother can make Proof by one Witneſs at the leaſt, that the Child whoſe Death was by her ſo intended to be concealed was born dead.* In the Conſtruction whereof it hath been [d] adjudged, That in order to convict a Woman by Force of this Statute, there is no need that the Indictment be drawn ſpecially, or conclude *contra formam Statuti*; but that it is the bettet way to ſet forth only that the Defendant *infantem maſculum vivum parturiit, qui quidem infans maſculus adtunc & ibidem vivus exiſtens natus per legem hujus regni Angliæ Spurius fuit, Anglice* a Baſtard, and then to go on in the ordinary Way to ſhew that ſhe murdered him, *&c. contra pacem, &c.* for the Statute doth not make a new Offence, but only make ſuch Concealment an undeniable Evidence of Murder. Alſo it hath been [e] agreed, That where a Woman appears to have endeavoured to conceal the Death of ſuch Child within the Statute, there is no need of any Proof that the Child was born alive, or that there were any Signs of Hurt upon the Body, but it ſhall be undeniably taken that the Child was born alive and murdered by the Mother. But it hath been [f] adjudged, That where a Woman lay in a Chamber by herſelf, and went to Bed without Pain, and waked in the Night, and knocked for Help but could get none, and was delivered of a Child and put it in a Trunk, and did not diſcover it till the following Night, yet ſhe was not within the Statute, becauſe ſhe knocked for Help. Alſo it hath been [g] agreed, That if a Woman confeſs herſelf with-child before-hand, and afterwards be ſurpriſed and delivered, no Body being with her, ſhe is not within the Statute, becauſe there was no Intent of Concealment. And therefore in ſuch Caſes it muſt appear by Signs of Hurt upon the Body, or ſome other way, that the Child was born alive.

[o] 9 Ch 67. b. Cro. Jac. 280. H P. C. 266.
[p] *See* B. 1. Ch. 31. Sect. 18, 19, *and* S. 40 *to* 43.
[q] 9 Co. 67.
[a] 9 Co. 62, 63, 67.
[b] Co. Litt. 6. b. S. P. C. 179. Lett. A. Vide ſupra, Ch. 45. Sect. 10. *and* State Trials, Vol. 1. fol. 181, 636. Vol. 2. fol. 408. Vol. 3. f. 228, 229, 688, 689, 894 *to* 901, 928, 929, 930.
[c] Co. Litt. 6. b.
[d] Kely. 32.
[e] Kely. 32, 33.
[f] Kely. 32.
[g] Kely. 33.

Sect. 44. As to the ſeventh Point, *viz.* What may be given in Evidence on the part of the Defendant: It ſeems [f] agreed, That *ſon aſſault Demeſne* may be given in Evidence on the General Iſſue in an Indictment, but not in an Action of Battery. Alſo it ſeems to have been always [g] agreed, that the Defendant in an Information on a Penal Statute may give in Evidence any Exception in his Favour in the Body of the Act. And it hath alſo been [h] holden that he may give in Evidence any ſuch Exception in a *Proviſo* of the Act, (becauſe any ſuch Exception ſhews that he did not act againſt the Form of the Statute;) but that he cannot [d] give in Evidence any Clauſe of Exemption in a later Statute, but ought to plead it.

[a] B. 1. Ch. 62. Sect. 3.
[b] Savil, 32 pl. 75.
[f] 1 Jon. 157.
[g] 2 Rol. Abr. 683. pl. 11.
[h] 2 Roll. Ab. 683. pl. 10, 12. *But this is left a Quære* Savil, 32. pl 75.

Bro General Iſſue, 3. Vide Supra Ch. 25. Sect. 115. [d] 2 Roll. Abr. 683. pl. 13.

CHAP. XLVII.

Of Verdict.

FOR the general Learning of Verdicts I ſhall refer to other Books, and in this Place take Notice only of the following Particulars;

Sect. 1. 1*ſt*. That it ſeems to have been [e] anciently an uncontroverted Rule, and hath been allowed, even by thoſe [f] of the contrary Opinion, to have been the general Tradition of the Law, That a Jury ſworn and charged in a capital [g] Caſe, cannot be diſcharged (without the [h] Priſoner's Conſent) till they have given a Verdict. And notwithſtanding ſome [i] Authorities to the contrary in the Reign of King *Charles* II. this hath been holden for clear Law both in the Reign of King [l] *James* II. and [m] ſince the Revolution.

Sect. 2. 2*ndly*, That it ſeems to have been * always agreed, That in all † capital Caſes the Jury muſt give their Verdict openly in Court, and cannot give a privy Verdict.

Sect. 3. 3*dly*, That it is ſettled, [n] That the Jury may give a ſpecial Verdict in any criminal Caſe, whether capital or not capital, as well as in a Civil.

Sect. 4. 4*thly*, That it hath been [o] adjudged, That where the Jury find a Man not guilty of an Indictment or Appeal of Murder, they are not bound to make any Inquiry, whether he be guilty of Manſlaughter, *&c.* But that if they will they may, according to the Nature of the Evidence, findhim guilty of [p] Manſlaughter or [q] Homicide *ſe defendendo*, or *per infortunium*; for the killing is the Subſtance, and the Malice but a Circum-

[e] Co. Litt. 227. b. 3 Inſt. 110. 1 And. 103, 104. H. P. C. 267.
[f] Raym. 84.
[g] *And the ſame is holden by* Coke *as to Larceny, and any Caſe of Member.* 3 Inſt. 110. Co. Lit. 227. b. *but as to Caſes of an Inferior Nature, the contrary hath been adjudged,* Raym. 84.
[h] 1 And. 103, 104.
[i] Kely. 47, 52. State Trials, Vol. 1. fol. 978. Vol. 2. fol. 155, 277, 389.

Raym. 84. [l] State Trials Vol. 3. f 678. Vide ſupra Ch. 44. Sect. 22. [m] State Trials, Vol 4. fol. 110, 178, 179. * Co Lit. 227. b. 3 Inſt. 110. Raym. 193. † *The ſame is holden by Sir* Edward Coke, *as to Larceny, and any Caſe of Member,* 3 Inſt. 110. Co. Lit. 227. b. *And it is ſaid in* Raym. 193. *That no privy Verdict can be given in any Caſe where the Jury are to look upon the Priſoner when they give it.* [n] S. P. C. 165. Lett. C. H P. C. 267. 9 Co. 12. b. 63. 1 Bulſt. 87. Vide infra, Sect. 6. *But it is ſaid,* Kely. 29, 30. *That it is diſhonourable for the Court to ſuffer a ſpecial Verdict in a plain Caſe.* [o] Cro. Eliz. 276, pl. 5. 296, pl. 2. 464. pl. 13. [p] Dyer, 261. pl. 26. 4 Co. 43. b. 9 Co. 81. Daliſ. 14. H. P. C. 267. Latch, 126. Pl. Com. 101. Cro. Eliz. 276. pl. 5. 296, pl. 2. 464, pl. 13. Moor 407. pl. 546. Bro. Coro. 121 or 122. *But* 2 Roll. Re. 461, *this was queſtioned as to an Appeal of Death.* [q] Bro. Coro. 1. H. P. C. 267. Daliſ. 14. S. P. C. 165. Lett. A. *See the Books cited to the following Section.*

ſtance

[r] 1 Buſt. 87. *'Tis holden by two Judges againſt one, That where the Appeal mentioned three Wounds and the Verdict found but one, yet the Variance was immaterial.* Vide Ch. 46. Sect. 37.

ſtance, a [r] Variance as to which hurts not the Verdict. Yet the Books ſeem to make this Difference, That where the Jury find the Defendant guilty of Manſlaughter on an Indictment of Murder, they may give their Verdict [s] generally, without ſetting out any of the Circumſtances of the Fact: But that they ſhall not [a] be received to find him guilty generally of Homicide *ſe defendendo*, or *per infortunium*, but muſt ſet out the whole Circumſtances of the Fact, and in the [b] Concluſion ſhew of what Crime they find the Defendant guilty, wherein if they be miſtaken, it is [c] ſaid, That the Court may notwithſtanding give ſuch Judgment as ſhall appear to be proper from the Circumſtances of the Fact ſpecially ſet forth.

[s] *See the Books cited under Letter* p.
[a] H. P. C. 267. S. P. C. 15. Lett B. 165. Lett. A. 3 Inſt. 56. 26 H. 8. 5. a. Aleyn 12.

Sect. 5. *5thly*, That it hath been [d] adjudged, That if the Jury on an Indictment or Appeal of Murder find the Defendant guilty of Manſlaughter, without ſaying any thing expreſsly as to the Murder, it is inſufficient and void, as being only a Verdict for Part. And *Quære* if the Law be not the ſame where the Jury upon ſuch an Indictment find that the Defendant killed the Deceaſed *ſe defendendo* or *per infortunium*, and do not expreſsly find that he did not murder him, according to the Generality of the ancient [c] Authorities.

[b] Fitz. Coro. 264, 286, 287, 305. Vide Benl. 47. 1 And. 41.
[c] 43 Aſſ. pl. 31. Fitz. Coro. 226. Crmpt. Juſt. 114 pl. 1. S. P. C. 165. Lett. A. Vide Bendl. 47. 1 And. 41.

Sect. 6. *6thly*, That it is agreed, That on an Indictment for ſtealing Goods of a certain Value above 12 *d.* the [f] Jury may find the Defendant guilty, but that the Goods are but of the Value of 10 *d. &c.* But it ſeems that if a Man be indicted for Felony, generally, and upon the Evidence it [g] plainly appear that the Fact amounts to no more than a bare Treſpaſs, he cannot be found guilty of the Treſpaſs, but ought to be indicted anew. Yet if the ſpecial Circumſtances of the Caſe be ſet forth in an Indictment for an Offence laid as Felony, and the Defendant be found guilty generally, and afterwards the Court be of Opinion that the Fact doth not amount to Felony, but only to an enormous Treſpaſs, it ſeems [h] agreed, That Judgment may be given as for a Treſpaſs only. Alſo if the Jury find a ſpecial Verdict on a general Indictment for Felony; and the Crime be adjudged upon ſuch Verdict to be but a Treſpaſs, [i] Judgment may be given upon it as for a Treſpaſs only. Alſo if on an Indictment of Treſpaſs the Fact appear to have been felonious, it hath been [k] adjudged, That the Defendant may be found guilty of the Indictment as it is laid, becauſe the King may proceed againſt the Offender as he thinks fit, either as a Treſpaſſer or Felon. But the contrary is [l] ſaid to have been holden by the late Chief Juſtice *Holt*; and it hath been [m] adjudged, That if it appear in an Action of Treſpaſs that the Taking was felonious, no Verdict ought to be taken unleſs the Defendant have been before tried for the Felony, becauſe the ſuffering ſuch Actions might be a Means to prevent Proſecutions for Felonies.

[d] 1 And. 103, 104. *and note, That in all the Books cited under the preſedent Section to Lett.* p. *where the Defendant is found guilty of Manſlaughter on an Indictment of Murder, he is expreſsly acquitted of the Murder. but other Books which ſpeak of this Matter, ſay in general, That the Defendant may be found guilty of Manſlaughter on an Indictment of Murder, without ſaying any thing as to the Neceſſity of giving an expreſs Verdict upon the Murder.* 9 Co. 67 b. Crompt. Juſt. 114. pl. 5. H. P. C. 267. *See* 4 Co. 40. a. 46. b.
[e] Fitz Coro. 284, 286, 287. Sed Vide 44 E. 3. 44. pl. 55. Fitz. Coro. 94. Benl. 47. 1 And. 41. [f] Fitz. Coro. 115, 177, 451. 18 Aſſ. pl. 14. H. P. C. 267. S. P. C. 165. Lett. B. Crompt. Juſt. 114. pl. 2. B. 1. Ch. 35. Sect. 4 [g] Kely 29, 30. Cro. Ca. 332. *'Tis made a Quære* 2 H. 7. pl. 22. *and* 10 pl. 6. *whether where an Indictment of Larceny is inſufficient as to the Felony, the Party may be found guilty of the ſame taking as for a Treſpaſs.*
[h] Kely 29, 30. Cro. Ca. 376, 377. 1 Jon. 351. [i] Cro. Ja. 497, 498. [k] 18 Ed. 4. 10. pl. 28. 2 Lev. 208. Vide ſupra, Ch. 35. Sect 5. *and* Ch. 36. Sect 6. *That an Acquittal or Judgment againſt a Man in an Action or Indictment of Treſpaſs is no Bar on an Indictment or Appeal of Larceny.* Kely. 30. 16 Mod. 77. [m] 2 Roll. Abr. 556, pl. 19. 557, pl. 20, 21, 22, 23, 24. Noy 18. Vide 1 Jon. 147. Noy 82. Latch, 145. 1 Mod. 283. Cont. Bract. *cited* S. P. C. 28. a. 83. b.

Sect. 7. 7*thly*, That it hath been holden, That a Verdict acquitting a Defendant of the Death of a Man found againſt him by the Coroner's Inqueſt, ought not to be received unleſs it ſhew what other Perſon did the Fact; but for this I ſhall refer to *Ch.* 9. *Sect.* 33.

Sect. 8. 8*thly*, That on an Indictment for a Riot againſt three or more, if a Verdict acquit all but two and find them guilty; or on an Indictment for a Conſpiracy, if the Verdict acquit all but one, and find him guilty, it is repugnant and [n] void as to the two found guilty in the firſt Caſe, and as to the one found guilty in the ſecond, unleſs the Indictment charge them with having made ſuch Riot, or Conſpiracy, *ſimul cum aliis, juratoribus ignotis*; for otherwiſe it appears that the Defendants are found guilty of an Offence whereof it is impoſſible that they ſhould be guilty; for there can be no Riot where there are no more Perſons than two, nor can there be a Conſpiracy where there is no Partner. Yet it ſeems [a] agreed, That if twenty Perſons are indicted for a Riot or Conſpiracy, and any three found guilty of the Riot, or any two of the Conſpiracy, the Verdict is good; And that [b] where ſeveral are indicted for Treaſon or Felony, or other Crime, which may be as well done by one only, as by more, a Verdict [c] may find one of the Defendants only guilty, and acquit all the reſt. And in like Manner it ſeems [d] agreed, That a Verdict on an Information on a penal Statute againſt ſeveral Perſons jointly charged with the Offence againſt the Statute, may acquit ſome and find others guilty; becauſe tho' the Words of the Information be joint, yet in Judgment of Law, each Defendant is ſeverally charged for his own Offence. And in like Manner it [e] ſeems, That the Defendant in ſuch Information may be found guilty for a leſs Time, or Degree than is laid, unleſs the Offence conſiſt in the doing ſome entire Thing which muſt be preciſely proved in the ſame Manner as it is laid.

Sect. 9. 9*thly*, That the Court in judging upon a ſpecial Verdict is confined to the Facts expreſsly found, and cannot ſupply the Want thereof, as to any material Part by any Argument or Implication from what is expreſsly found; and therefore where an Indictment ſet forth that the Defendant diſcharged a Gun againſt *J. S.* and thereby give him a mortal Wound, *&c.* and the Special Verdict found that he diſcharged a Gun and thereby killed *J. S.* but did not expreſsly ſay that he diſcharged it againſt *J. S.* it was [f] adjudged, That the Court could not take it from the other Circumſtances of the Fact, which were expreſsly found, tho' they were as full to the Purpoſe as poſſibly they could well be, that the Defendant diſcharged the Gnn againſt *J. S.*

Sect. 10. 10*thly*, That it hath been [g] adjudged, That where an Indictment found at the Aſſiſes is removed into the King's Bench by *Certiorari*, and there the Defendant pleads Not guilty, *& de hoc ponit ſe ſuper patriam, &* T. F. *Miles coronator & attornatus Dom' Regis, &c. ſimiliter*, and thereupon the Defendant is found Guilty of the Offence *in Indictamento prædict' interius ei impoſit' prout prædict.* T. F. *interius verſus eum queritur*, the Verdict is good; for thoſe Words *prout prædict.* T. F. *interius verſus cum queritur* ſhall be rejected as Surplus, [h] repugnant and void, and the Verdict is compleat without them.

[n] Poph. 202. 1 Saik. 385. State Trials, Vol. 2. f. 60, 61. Vol. 4. f. 160, 161. *In the Year-Book of* 11 H. 4. 2. pl. 3. *Abridged* Fitz. Verdict, 18. *It is agreed, That ſuch a Verdict is repugnant, and therefore the Court would not receive it, but ſent the Jury back again, where upon they found both the Defendants guilty.*

[a] State Trials Vol. 4. fol. 160, 161.

[b] State Trials, Vol. 4. f. 160, 161.

[c] *Yet it hath been holden, That on an Indictment of Burglary and other Felony againſt* A *and* B. *the Jury cannot upon the very ſame Evidence againſt both, find* A. *guilty of the Burglary, and* B. *of the Felony only*, 1 Sid. 171. pl. 4.

[d] Vide ſupra, Ch. 26. Sect. 75.

[e] Vide ſupra, Ch. 26. Sect. 75. *and* State Trials, Vol. 4. fol. 160, 161.

[f] Kely. 111.

[g] 2 Saund. 308.

[h] *See* B. 1. Ch. 30. Sect 9. *What is a good Verdict on an Indictment of Forgery*, B. 1. Ch. 70. Sect. 27.

Sect. 11. 11*thly*, That it hath been [a] adjudged, That if the Jury acquit a Priſoner of an Indictment of Felony againſt manifeſt Evidence, the Court may, before the Verdict is recorded, but [b] not after, order them to go out again and reconſider the Matter; but this is by many thought hard, and ſeems not of late Years to have been ſo frequently practiſed as formerly. Alſo there are [c] Inſtances where Defendants acquitted againſt plain Evidence, of Felonies and other enormous Crimes, have been bound to their Good Behaviour. However it is ſettled, That the Court cannot ſet aſide a Verdict which [d] acquits a Defendant of a Proſecution properly criminal, as it ſeems that they may a Verdict that [e] convicts him for having been given contrary to Evidence, and the Directions of the Judge, or any Verdict whatever for a [d] Miſtrial.

[a] 1 And. 104. Crompt. Juſt. 114. pl. 6. Aleyn. 12. Vide State. Trials, Vol. 2. f. 60, 61.

[b] Crompt. Juſt. 114. pl. 6. Fitz. Coro. 108.

[c] Cro. Ca. 292. *againſt the Opinion of* Cro. *and* Berkely, *and* Cro. Ja. 507. Vide State Trials, Vol. 2. fol. 60, 61. *where the Court upon the Acquittal of the Defendants of the Indictment againſt them for a Riot, committed them for their contempt to the Court during the Trial.* [d] *Agreed in the Caſe of the* King *and* Bennet, Hill. 4 Georgii, *wherein it was holden by ſix of the Judges againſt ſix. That a new Trial was not grantable upon an Acquittal on an Information in the Nature of a* Quo Warranto, *becauſe it ſounds in the Criminalty.* 1 Keb. 124. pl. 33. 2 Keb. 403, pl. 14. 404. pl. 18. *Whether it be grantable for a corrupt Practice in obtaining a Verdict,* 1 Lev. 9, 10, 124. 1 Sid. 153, 154. 1 Keb. 546, pl. 47. 568, pl. 16. 590. pl. 54. 3 Keb. 179. pl. 2. 409. pl. 31. Shower 336. *That it is not grantable where the Acquittal was occaſioned by a ſlip in an Indictment of Perjury in varying from the Original Record,* 2 Keb. 409. pl. 31. [e] *Adjudged* 2 Jon. 163. 3 Keb. 525. 1 Lev. 9. *But it is doubted* 1 Keb. 124. pl. 33. 127. pl. 43. 5 Mod. 350. 1 Sid. 49. pl. 12. *and the contrary is ruled* 2 Keb. 396, pl. 81. 403. pl. 14. [f] *See* 6 Co. 14. b. 1 Keb. 546. Supra, Ch. 23. Sect. 92. *and* Ch. 36. Sect. 15.

CHAP. XLVIII.

Of Judgment.

Sect. 1. HAving ſhewn already what Judgment is good on an Information, or Action *qui tam*, and *Ch.* 33. *Sect.* 135, *&c.* where it may be ſaved by an Award of Tranſportation, and *Ch.* 25. *Sect.* 149. That Judgment in High Treaſon, not being for counterfeiting the Coin, or Seal, *&c.* ſhall not be arreſted for Miſwriting or Miſpelling, or falſe or improper *Latin*: Having alſo premiſed, That by the Courſe of the Court of King's Bench, upon every Conviction in that Court, of a Crime [f] capital or not [g] capital, whether by * Verdict or Confeſſion, the Party is to have four Days to move in [h] Arreſt of Judgment, if there be ſo many Days remaining of the Term; and if not, [i] then the longeſt Time that can be had in the Term: Having alſo premiſed, That on a Conviction of Homicide *ſe defendendo*, or *per infortunium*, no [k] Judgment at all is to be given, but the Party let to Mainprize in Order to purchaſe his Pardon, I ſhall farther endeavour to ſhew the Nature,

[f] Algernoon Sidney's *Caſe*, State Trials, Vol. 3. fol. 207, 231. Roſewell's *Caſe*, State Trials, Vol. 3. Knightley's *Caſe*, State Trials, Vol. 4. fol. 215.

[g] State Trials Vol. 3. fol. 77. * State Trials, Vol. 4. fol. 210. [h] *But in* Saund. 301, 302. *Chief Juſtice* Hale *refuſed to hear any Motion in Arreſt of Judgment of a ſcandalous Conſpiracy; but in my own Experience I never knew ſuch a Motion refuſed to be heard.* [i] State Trials, Vol. 4. fol. 217. *Yet in the Lord* Grey's *Caſe*, State Trials, Vol. 3 fol 77. *the Court would not give Judgment on a Conviction for a Miſdemeanour, becauſe there were not four Days left of the Term.* [k] H. P. C. 269. B. 1. Ch. 29. Sect. 24. Supra, Chh. 37. Sect. 2.

1. Of Judgments by expreſs Sentence to the Puniſhment proper for the Crime.
2. Of Judgments without any ſuch Sentence.

Of Judgments by ſuch expreſs Sentence in criminal Caſes there are two Kinds.

1. Such as are fixt and ſtated, and always the ſame for the ſame Species of Crimes.
2. Such as are diſcretionary and variable according to the different Circumſtances of each Caſe.

Sect. 2. And firſt of fixt and ſtated Judgments; as to which it ſeems [a] agreed, That the Law makes no Diſtinction between a Peer and a Commoner, or between a common and ordinary Caſe, and one attended with extraordinary Circumſtances; for which Reaſon it was [b] adjudged in *Felton*'s Caſe, who was convicted by Confeſſion of the Murder of the Duke of *Buckingham*, that the Court could not order his Hand to be [c] cut off, nor make it part of the Sentence that his Body ſhould be hanged in Chains, but that the Body after Execution being at the King's Diſpoſal might be hanged in Chains, or otherwiſe ordered as the King ſhould think fit.

[a] State Trials Vol. 2. fol. 704. 3 Inſt. 31.
[b] Hetl. 116. Litt. Rep. 237. Rushworth's Collections, Part 1. fol. 640, 641.
[c] *Agreed* 3 Inſt. 140. 12 Co. 71. *That the Court cannot order the Hand to be cut off in any Caſe wherein it is not the ſtated judgment. See* B. 1. Ch. 21. Sect. 1 *to* 7.

Of ſuch fixt and ſtated Judgments, the moſt remarkable are thoſe for Treaſon and Felony, *Præmunire* and Miſpriſions.

Sect. 3. The ſettled [d] Judgment at [e] this Day againſt a Man for High Treaſon, not relating to the Coin, ſeems to be, That he ſhall be [f] carried back to the Place from whence he came, and from thence be [g] drawn to the Place of Execution, and be there hanged by the [h] Neck, and cut [i] down alive, and that his [k] Entrails be taken out and [l] burnt before his Face, and his Head cut off, and his Body divided into four Quarters, and his Head and Quarters diſpoſed of at the King's Pleaſure. And I find little or no Variation in Subſtance from this Judgment, but only in ſome Circumſtances, for which I ſhall refer to the Notes in the Margin and the *State Trials*.

[d] 3 Inſt. 210. 211. H. P. C. 268. S. P. C. 182. Lett. E. Plow. Com. 387. b. Co. Entr. 361. b.
[e] *In the Time of* Will. Ruſus *Judgment was given againſt two convicted of High Treaſon that one ſhould have his Eyes put out,* in crucem tollatur. Madox *Hiſtory of the Exchequer*, fol. 6.
[f] S. P. C. 182. Lett E. *But this is wholly omitted in* H. P. C. 268. *and* 3 Inſt. 210 *and in* Plowd. Com. 387. b *it is thus expreſſed,* quod duceretur per præfat' conſtabular' uſque dictam turrim *London*, &deinde, &c. *And in* Co. Entr. 361. Quod præd. *T. B.* ducatur per præfat. Mareſc' uſque priſonam Mar' Mareſc' Domini Regis, &c. Lett. E. *It is expreſſed, That he ſhall be drawn upon an Hurdle. And* Plow. Com. 387. b. *it is, That he ſhall be drawn thro' the middle of the City of* London, *to the Gallows at* Tyborn. *Alſo in* Co. Entr. 361. b. 110. *a particular Place of Execution is mentioned.* [g] *and the other Clauſe is wholly* præd' R. D. b. *it is thus,* [g] S. P. C. 182. *he ſhall be drawn thro' the middle of the City of* London, *to the Gallows at* Tyborn. *Alſo in* Co. Entr. 361. b. *a particular Place of Execution is mentioned.*
[h] S. P. C. 182. b. *and* 3 Inſt. 110. *But* Plowd. Com. 387. b. Co. Entr. 361. b. *and* H. P. C. 268. *it is only ſaid,* Quod ſuſpendatur, *without adding* per collum [i] 3 Inſt. 110. S. P. C. 182, Lett. E. Plow. Com. 387. b. Co. Entr. 361. b. *But this is omitted* H. P. C. 268.
[k] *This Clauſe is thus expreſſed,* 3 Inſt. 210, 211. Plowd. 387. b. Co. Entr. 361. b. Quod interiora ſua extra ventrem ſuum capiantur, *without mentioning the cutting off of the Privy Members; and ſo is* H. P. C. 268. *and the later Precedents. But* S. P. C. 182. Lett. E. *is expreſs that they ſhall be cut off.*
[l] S. P. C. 102. Lett. E. *But in* Plowd. Com. 387. b. Co. Entr. 361. b. 3 Inſt. 211. *it is thus expreſſed* ipſoque vivente, comburantur.

Sect. 4. It hath been always agreed to be the proper Judgment against a Man for High Treason at Common Law, in counterfeiting the King's [a] Coin or [b] Seal, That he shall be drawn to the Place of Execution, and there hanged by the Neck till he be dead. But there have been [c] great Opinions, That the Judgment against a Man for Clipping, and other Offences against the Coin, made Treason by Statute, shall be to be drawn, hanged and quartered, as for other High Treasons; because it is a general [d] Rule, That where a Statute makes an Offence Treason or Felony, it gives it the like Incidents that belong to a Treason or Felony by the Common Law; yet inasmuch as High Treason at Common Law in counterfeiting the Coin had Judgment only of Drawing and Hanging; and it is a reasonable Construction, That the Makers of the Statutes, which made other Offences concerning the Coin High Treason, intended to give such Offences the like [e] Incidents with High Treasons against the Coin at the Common Law, and not to make inferior Offences of this Kind subject to a heavier Punishment than the greater; it seems to be [f] settled at this Day, That the Judgment for such Offences shall be the same as for counterfeiting the Coin, *&c.* at the Common Law, *i. e.* of Drawing and Hanging, without Quartering.

Sect. 5. It hath been [g] long [h] agreed, That the Judgment against a Man for Petit Treason is the same with that for counterfeiting the Coin, *viz.* That he shall be [i] drawn to the Place of Execution and there hanged by the Neck till he be dead.

Sect. 6. The Judgment against a [k] Woman, in all Cases of Treason, whether High or Petit Treason, is, That she shall be drawn to the Place of Execution, and there burnt.

Sect. 7. The Judgment against a Man or [l] Woman for Felony of Death, hath always been the same [m] since the Reign of *H.* 1. *viz.* That he or she be [n] hanged by the [o] Neck till [p] dead, which in the [q] Roll is shortly entered thus, *Suf. per coll.*

Sect. 8. For the Judgment of *Pain fort & dure* upon an Offender's standing Mute, I shall refer to *Ch.* 30. *Sect.* 16.

Sect. 9. Judgment in *Præmunire* at the Suit of the [r] King, against a Defendant, being in * Prison, is, That he shall be out of the King's Protection, and that his Lands and Tenements, Goods and Chattels shall be forfeited to the King, and that his Body shall remain in Prison at the King's Pleasure; but if the Defendant be condemned upon his [s] Default in not appearing, whether at the Suit of the King or [t] Party, the same Judgment shall be given as to the being out of

[a] S. P. C. 182. Lett. E. 3 Inst. 17. H. P. C. 268. Cro. Ca. 383. 19 H. 6. 47. b pl. 103. *Abridged* Fitz. Coro. 8. Bro. Treas. 9.

[b] Fleta, B. 1. Ch. 22. Sect. 1.

[c] S. P. C. 182. Lett. E. 3 Inst. 17. H. P. C. 19.

[d] *See* B. 1. Ch. 40. Sect. 4.

[e] *See* 2 Jon. 233. Supra Ch. 25. Sect. 147.

[f] Dy. 230. pl. 55. 2 Lev. 98. 2 Jon. 233. 3 Keb. 278. pl. 27. Raym. 234.

[g] *But* Bract. 104. b. *it is said, That they are burnt*, qui salutem dominorum suorum insidiaverint.

[h] 3 Inst. 211. H. P. C. 268. S. P. C. 182. Lett. F. 19 H. 6 47. pl. 102. *Abridged* Fitz. Coro 7. Bro. Treason 8. 33 Ass. pl. 7. *Abridged* Bro. Treason, 15. Fitz. Coro. 219.

[i] *See* 21 E. 3. 17. pl. 21. *Abridged* Fitz. Coro. 447. Bro. Coro. 38. *where an Approver becoming Nonsuit, had Judgment to be hanged only, and not drawn, tho' he stood indicted of Treason.*

[k] *Preface to the 6th Report.* H. P. C. 268. 3 Inst. 211. *Abridged* Bro. 46.

[l] 1 Ric. 3 Inst. 211. 60. b. 352. b. 53, 211. H. 42, b, pl. 2.

[m] 3 Inst. 53.

[n] S. P. C. 182. Lett. G. H. P. C. 268. S. P. C. 182. Lett. G. *And* in 8 H. 4. 6. b. 7. a. *Abridged* Fitz. Forfeiture, 13. Bro. Forfeiture, 12. Præmunire, 6, *and* 20. *That such Judgment shall not be given at the Suit of the Party, on* 27 Ed. 3. *but in the two last Citations 'tis holden, That the same Judgment shall be given at the Suit of the Party on* 16 Rich. 2. Co. Litt. 129. b. 130. a. Dalt. ch. 90. 30 E. 3, 11. 3, 37. Præmunire, 8, 20.

[o] Fitz. Coro. 227. *See the Citations to the next Letter.*

[p] *The Words* per collum *are omitted* Co. Entr. pl. 2. 353, b. pl. 3. 355, b. pl. 7. 360. pl. 13. *and* Rast. Ent. 42, b. pl. 2. 53, b. pl. 6. 55. b. pl. 6.

[q] 3 Inst. P. C. 268. 6 E. 4, 4. *But this is omitted,* 6 H. 4. 6. b. S. P. C. 182. Lett. G. *and in* Rast. Ent. 53, b. pl. 6. 55. b. pl. 6. *the Precedents in* Coke's Entr. *cited to Letter* O. *comes only under an* &c.

[r] Co. Litt. 129. b. *'tis agreed,* 30 E. 3. 11. *Abridged,* Fitz. Judgment, 145.

[s] 3 Inst. 218. Supra B. 1. Ch. 19. S. 14, 45. Vide B. 1. Ch 19. Sect. 14. Rast. Entr. 466, b. 467. b. 3 Inst. 125, 218.

[t] 8 H. 4, 6. b. 7. a. *Abridged* Fitz. Forfeiture, 13. Bro. Forfeiture, 12. Præmunire, 6, 20. b. *Abridged* Fitz. Judgment, 145. 44 E. 3 7. pl 6. *Abridged* Fitz. Responder, 35. 39 E. 3, 37. *Abridged* Fitz. Return de vicount, 61. Attorney, 36. 8 H. 6. 3. pl. 8. *Abridged* Bro.

the

the King's Protection, and the Forfeiture; but inſtead of the Clauſe, that the Body ſhall remain in Priſon, there ſhall be an Award of a *Capiatur*.

Sect. 10. The Judgment againſt a Man for Miſpriſion of High Treaſon [a] is, That he ſhall be impriſoned during his Life, and forfeit all his Goods, and the Profits of his Lands during his Life.

Sect. 11. The Judgment againſt a Man for drawing a Sword on a Judge, or ſtriking any Perſon in the [b] Preſence of the King's Higher Courts, is, That he ſhall be impriſoned during Life, and forfeit his Goods, and the Profits of [c] his Lands during Life, and that his [d] Right Hand ſhall be cut off at a certain Place.

Sect. 12. For the Judgments for [e] ſtriking in the King's Palace, for [f] reſcuing a Priſoner from the Superior Courts, [g] for Perjury, or [h] Forgery on the Statute, and for the villainous [i] Judgment in Conſpiracy at the Suit of the King, I ſhall refer to the Citations in the Margin.

Sect. 13. The Entry of the Judgment for a Defendant upon an Acquittal by Verdict, or upon the Plea of a Pardon is, *ideo conſid' eſt quod præd'* A B. *de* [k] *præmiſſis eat inde die*, or *eat ſine die*, omitting [l] *de præmiſſis*; or *de proditionibus prædictis eat inde* [m] *quietus*; or [n] thus, *Quod ſit inde quietus, &c. & quod ipſe eat inde ſine die*; and upon the Plea of a Releaſe to an Appeal, and in other Caſes of like Nature, it is, *ideo conſid' eſt quod* [o] *præd'* A. *quoad ſectam præd'* B. *in præmiſſis eat inde ſine die.* And [p] *Staundforde* ſays, That upon the Acquittal of one arraigned of Treaſon or Felony, the Judgment is no other, but that the Court diſcharges the Defendant paying his Fees.

Sect. 14. Secondly, As to Judgments by expreſs Sentence, which are diſcretionary and variable according to different Circumſtances, I ſhall obſerve in general, That for Crimes of an infamous Nature, ſuch as Petit [q] Larceny, [r] Perjury, or [s] Forgery at Common Law, groſs [t] Cheats, Conſpiracy not requiring a villainous Judgment, keeping a Bawdy-houſe, bribing [u] Witneſſes to ſtifle their Evidence, and other Offences of the like Nature, againſt the firſt Principles of natural Juſtice, and common Honeſty, it ſeems to be in great Meaſure left to the Prudence of the Court to inflict ſuch corporal Puniſhment, and alſo ſuch Fine and Lien to the Good Behaviour for a * certain Time †, *&c.* as ſhall ſeem moſt proper and adequate to the Offence, from the Conſideration of the Baſeneſs, Enormity, and dangerous Tendency of it, the Malice, Deliberation and Wilfulneſs, or the Inconſideration, Suddenneſs and Surprize with which it was committed, the Age, Quality and Degree of the Offender, and all other Circumſtances which may any way aggravate or extenuate the Guilt.

[a] H. P. C. 128, 269. 3 Inſt. 36, 218. Bro. Treaſon, 19, 25.

[b] *See* B. 1. Ch. 21. Sect. 3. *to* Sect. 6.

[c] *So it is* H. P. C. 131. *And in* 41 Aſſ. pl. 25. *Abridged* Bro. Fines, 11. Forfeiture, 41. Reſtitut. 32. Scire facias, 160. 2 Roll. Abr. 76. pl. 3. *Judgment was given, That the Lands ſhou'd be ſeiſed into the King's Hands, and the King anſwered of the Profits; after which the King granted over the Lands as forfeited, and then pardoned the Offence; and the Heir was reſtored upon a* Scire facias. *By which it appears that the Inheritance of the Lands was not forfeited.* (Vide ſupra, ch. 37. Sect. 54.) *But in* 1 Keb. 751. *the Judgment is, That the Lands ſhall be forfeited during Life; and* Daliſon 23. *a* Quære *is made by what Law the Lands ſhall be forfeited any during Life: Tet* 3 Inſt. 140, 218. *and* 39 Aſſ. pl. 1. *Abridged* Bro. Contempts, 9. Fitz. Aſſiſe, 333. Dyer, 188. pl. 10 Fitz. Judgment, 174. Coro. 280. S. P. C 38. Lett. B. Owen, 120. Cro. Eliz. 405. Daliſon, 23. *ſay, in general, That the Land ſhall be forfeited, without adding for Life; and* 22 Ed. 3. 12. pl. 26. *Abridged* Fitz. Forfeiture, 21. *That the Offender ſhall be diſinherited.*

[d] *in this Part of the Judgment the Books above cited generally agree.*

[e] B. 1. Ch. 21. Sect. 1, 2. [f] B. 1. Ch. 21. Sect. 5. [g] B 1. Ch. 69. Sect. 11, 13. [h] B. 1. Ch. 70. Sect. 12. [i] B. 1. Ch. 72. Sect 9 [k] Co. Entr. 356. b. Raſt. Ent. 47. b. pl. 3. 48. a pl. 4. [l] Co. Entr. 358. a. pl. 9, 10. 359. b. Raſt. Entr. 51. b. pl. 12. 56. a. pl. 5. 57. pl 7. [m] Co. Entr. 360. b. Raſt. Entr 51 pl. 14. [n] Raſt. Ent. 49, b. pl. 6 57. pl. 7. [o] Raſt. Entr. 43, pl 8. 50. pl. 10. [p] S P.C. 182. Lett. I. [q] 3 Inſt. 218. B. 1. Ch 33. Sect. 36 [r] State Trials, Vol. 3. fol. 487, 488. Hob. 62. [s] Raym. 81. 1 Sid. 142, 278. 3 Leon. 170 [t] Cro. Ja. 498. 2 Roll. Abr. 78 H. 1 1 Keb. 849. Noy 99, 103. [u] State Trials, Vol. 2. fol. 272. Raym. 376 * 1 Sid. 214. pl. 14. † *See* Cro. Ca 55. *a Decree of the Star-Chamber againſt a Judge for Bribery, that he ſhould be incapable of any Office of Judicature.*

Sect. 15. And at this Day by Force of 5 *Annæ* 6. and 4 *Georg.* 11. and 6 *Georg.* 23. ſet forth more at large, *Ch.* 23. *Sect.* 134 *to* 139. the Judges upon a Conviction for Larceny, may in their Diſcretion award the Offender to the Houſe of Correction, and for that and other Felonies within the Benefit of the Clergy, inſtead of giving the uſual Sentence, *&c.* may direct that the Offender be tranſported.

[a] Daliſon, 20. [b] 2 Inſt. 47, 201. Co. Lit. 135. [c] Salk. 56, 400.

Sect. 16. But it [a] ſeems that the Court cannot be authoriſed by any Letters Patents, but only by Act of Parliament, to inflict a Puniſhment unknown to our Laws, as of [b] Baniſhment, *&c.*

Sect. 17. [c] *Note*, That the Court may aſſeſs a Fine, but cannot award any corporal Puniſhment againſt a Defendant, unleſs he be actually preſent in the Court.

[d] 11 Co. 43, 44. 1 Roll. Rep. 74, *&c.* Supra Ch. 9. Sect. 16. 1 Lev. 126. [e] Dy. 232. pl. 6. [f] Co. Litt. 127. a.

Sect. 18. *Note alſo*, That where there are ſeveral Defendants, a joint Award of one Fine againſt them all is [d] erroneous, for it ought to be ſeveral againſt each Defendant; for otherwiſe one who hath paid his proportionable Part might be continued in Priſon till all the others have alſo paid theirs, which would be in Effect to puniſh him for the Offence of another.

Sect. 19. It hath been [e] adjudged, That where a Man is to make Fine and Ranſom, the Ranſom muſt be treble the Fine at leaſt; but Sir [f] *Edward Coke* ſtrongly argues, That Fine and Ranſom are in legal Underſtanding the ſame Thing under different Names, called a *Fine*, becauſe it makes an End of the Buſineſs, and a *Ranſom*, becauſe it redeems from Impriſonment; for if they were different Things, it would follow that where the Books ſay, That a Man ſhall make a Fine and Ranſom, they muſt be taken to intend that he ought to pay two different Sums, of which there is no Precedent.

[g] Co. Litt. 260. a. *Adjudged* Raym. 376, 377. *and there ſaid that* Cro. Ca. 251. *is to be thus underſtood.*

Sect. 20. A Fine is under the Power of the Court, during the Term in which it is ſet, and [g] may be mitigated as ſhall be thought proper; but after the Term it admits of no Alteration.

2*ndly*, Of Judgments without an expreſs Sentence to the Puniſhment proper to the Crime, there are two Kinds,

1. Outlawry.
2. Abjuration.

[h] Finch of Law, 356. Dy. 223. pl. 24. Bro. Coro. 166. 3 Inſt. 212. [i] *If the Judgment appear not by the Return of the Exigent to have been given by the Coroner it is erroneous, except in* London, *where the Mayor by Cuſtom is Coroner, and the Judgment is given by the Recorder.* Co. Litt. 288. Bro. Utlagary, 31. Dy. 217. pl. 6. [k] 8 Co. 126. a. 21 H. 7. 33. Cro. Eliz. 648 pl 3. [l] Reg. Jud. 2. a. [m] 3 Inſt. 212. Litt. 128, b. 288. b. 28 Aſſ. pl. 49. *Abridged*, Bro. Nonability, 25. 3 Inſt. 212. Theloal, B. 1. Ch. 15. S. 20. [n] Co. Litt. 288. a. *But the contrary ſeems to be holden*, Dy. 223, pl. 23, 25. *and it is made a Quare*, 38 E. 3. fol. 324. [o] Vide Raſt. Ent. 332, a. b. [p] Finch of Law, 467. 3 Inſt. 52, 212. State Trials, Vol. 3. Bro. Coro. 166.

Sect. 21. Judgment of Outlawry is [h] given by the [i] Coroner at the fifth County-Court upon the Party's not appearing to the Exigent, (which is a [k] Writ commanding the Sheriff to cauſe the Defendant to be demanded from County-Court to County-Court until he be outlawed, *&c.*) and ſuch Judgment is [l] entred thus, *Ideo, &c. per judicium coronatoris Domini Regis comitatus prædict' utlagatus eſt.*

Sect. 22. It ſeems [m] agreed, That when a Judgment of Outlawry for Treaſon or Felony appears of Record by the Sheriff's Return of the Exigent; and it hath been [n] holden, That if it appears not by ſuch Return, but only by the Coroners Return of a [o] *Certiorari* to them directed to certify whether the Party were outlawed or not, the Party is as much [p] at-

tainted, and ſhall forfeit and loſe as much as if Sentence had been given againſt him upon a Verdict or Confeſſion.

Sect. 23. If ſuch [a] Outlawry appear to the Court to be erroneous, whereof any one as *amicus Curiæ* may inform them, the Party ſhall have Counſel aſſigned him to take Advantage of the Error; but if he will neither bring a Writ of Error, nor plead, in convenient Time, and the Outlawry be voidable only and not void, the proper Execution ſhall be [b] awarded againſt him, but no Sentence pronounced, becauſe the Outlawry is a Judgment, and no Man ſhall have [c] two Judgments for one Offence.

Sect. 24. For the Nature of Abjuration, (which was alſo an [d] Attainder of itſelf) being wholly obſolete at this Day, I ſhall refer to the Citations [e] in the Margin.

Sect. 25. It ſeems to be generally [f] agreed, That a Man can no other way be attainted of Treaſon or Felony at this Day, but only by Judgment by expreſs Sentence, or by Outlawry or Abjuration; and therefore where an Appellee was ſlain in the Field upon a Wager of Battle, [g] Judgment was given, *Quod ſuſpendatur per collum* in order to intitle the Lord to his Eſcheat. But I know of no other Caſe wherein it is clear at this Day, that a Man may be attainted after his Death: It is ſaid indeed in a Note in *Fitzherbert*'s [h] *Abridgment* of a Caſe in the Time of *Edward* III. that in *Eyre* it hath been ſeen that a Man hath been attainted by Preſentment after his Death; alſo it was holden by * *Markham* in the Time of *Henry* IV. That if he who levies War againſt the King be ſlain in Battle, his Lands may be ſeiſed by the King. And it is ſaid in the [k] *Fourth Report*, That if one aiding the King's Enemies be ſlain in open Rebellion, and the Chief Juſtice of the King's Bench, who is the Sovereign Coroner of *England*, make a Record of it upon the View of the Body, and return it into the King's Bench, he ſhall forfeit his Lands. And this ſeems agreeable to 34 *E.* 3. 12. whereby the King expreſsly reſerves his Prerogative as to Forfeiture of Wars, but grants that he will in no other Caſe ſeize Lands for Treaſon whereof the Party is not attainted in his Life. Yet the contrary Opinion ſeems to be holden in the *Firſt* and *Third* [m] *Inſtitutes*, and alſo by [n] *Hale*; and to this [o] *Staundforde* ſeems alſo to incline.

[a] 3 Inſt. 212, 213.
[b] State Trials, Vol 3 f. 323, 324, 334, 335.
[c] Finch of Law, 389, 467. S. P. C. 34. Letter C. 217 Lett. C. Fitz. Coro. 313, 335. 11 H. 7, 4. pl. 10. *Abridged* Bro. Coro. 226 *or* 227. 27 Aſſ pl 54. *Abridged* Bro. Coro. 110. 9 Ed. 4, 28. b pl. 41. *Abridged* Bro. Coro. 55 12 Co. 100. Fitz. Eſcheat, 14 Supra Ch 23. Sect. 53. Ch. 36 Sect. 1. *Yet Sentence was given upon one Outlawed of Felony*, 3 H. 7, 7. pl. 5. *Abridged* Bro, Coro. 134 *or* 135.
[d] Finch of Law, 389, 467. S. P C. 34, Lett. C. 117, Lett. C. 122. Lett. C, Fitz. Coro.

313, 335. 3 Inſt. 216, 217. [e] Supra, Ch, 9. Sect. 44. *and* Ch. 32. Sect. 6. 3 Inſt. 216, 217. [f] Bro. Coro. 166, *and the other Books under-cited.* [g] Fitz. Judgment, 225. Co Litt. 390. a. 3 Inſt. 212. 2 Inſt 283. Plowd, Com. 261, b. 262. a. Bro. Eſcheat, 24. [h] Fitz. Petition, 2. Co. Lit. 390, a. Vide Fitz. Coro. 290, 312. *and the next Chapter, Sect.* 16. *where a Felon killed in the purſuit forfeited his Chattels, and the Year, Day and Waſte, and the meſne Profits of his Lands from the Time of the Felony.* * 7 H. 4, 46 b. *but denied by* Gaſcoign; *and 'tis ſaid by* Brown, *in* Plowd. Com. 263. a. *that the antient Law was ſo. See alſo* Plowd. Com. 262. a. *and* Dalt. Ch. 89. [k] 4 Co. 57. b. [m] 3 Inſt. 27. Co. Litt. 13. [n] H, P. C. [o] S. P. C. 188. 189.

CHAP.

CHAP. XLIX.

Of Forfeiture of Lands and Goods, Loss of Dower, and Corruption of Blood.

AND now I am to shew the Consequences of an Attainder or Conviction of Treason and Felony, which I shall consider under the following Particulars.

1. What shall be forfeited by the Offender.
2. Where his Wife loses her Dower.
3. How far his Blood is corrupted.

As to the first Point, I shall endeavour to shew,

1. What is forfeited by the Common Law,
2. What by Statute.
3. To what Time the Forfeiture shall relate,
4. What shall be done with the Goods of an Offender before they are actually forfeited.

As to the first Particular, *viz.* what is forfeited by the Offender, by the Common Law, I shall endeavour to shew,

1. Where his Lands are forfeited by the Common Law.
2. Where his Goods.

[a] 3 Inst. 19. 3 Co. 2, 3.
[b] 3 Inst. 19. 3 Co. 2, 3.
[c] *See the Statute of* 25 Ed. 3, 2.
[d] Co. Litt. 2. 4 Co. 58, a. 1 Leon. 21. *and* infra S. 23.
[e] 3 Co. 10. Co. Litt. 2. S. P. C. 191, D. Bro. Coro. 208, 210 1 Leon. 21. Infra S. 23.
[f] S. P. C. 191. D. Fitz. Trav. 48. Assise, 166.

Sect. 1. And first as to the Forfeiture of Lands, it seems agreed, That by the Common Law all Lands of Inheritance whereof the Offender was [a] seised in his own Right, and also all Rights of [b] Entry to Lands in the Hands of a Wrong-doer, are forfeited to the [c] King by an Attainder of High-Treason, and to the Lord of whom they are immediately holden, by an Attainder of Petit Treason or Felony: And that the Lands whereof a Person attainted of High Treason dies [d] seized of an Estate in Fee are actually vested in the King without any Office, because they cannot descend, the Blood being corrupted, and the Freehold shall not be in Abeyance.

Sect. 2. But it seems [e] agreed, That by the Common Law such Lands were not vested in the actual Possession of the King during the Life of the Offender without an Office.

Sect. 3. Also it [f] seems clear, That the Lord cannot enter into the Lands holden of him upon an Escheat for Petit Treason or Felony, without a special Grant, till it appear by due Process that the King hath had his Prerogative of the Year, Day and Waste.

Sect.

Sect. 4. It is [a] said, That the Inheritance of Things not lying in Tenure, as of Rents Charge, Rents-Seck, Commons, *&c.* shall be forfeited to the King by an Attainder of High Treason, and that the Profits of them shall be also forfeited to the King by an Attainder of Felony during the Life of an Offender, and that the Inheritance shall be extinguished by his Death; for it cannot escheat, because there is no Tenure, nor descend because the Blood is corrupted.

[a] 3 In. 19, 21.

[b] 3 Co. 2, 3. 7 Co. 13. Vide infra, S. 23, 24, 25.

Sect. 5. But it is [b] said, That no Right of Action whatsoever to Lands of an Estate of Inheritance are forfeited, either by the Common Law, or by the Statute; and it seems agreed, That no [c] Right of Entry into such Lands whereof there is a Tenant by Feoffment, or other Title, nor [d] Use, (except only Lands convey'd [e] fraudulently with an Intent to avoid a Forfeiture,) nor [f] Condition, were liable to be forfeited before the Statute of 33 *H.* 8. and that [g] Land in Tail could not be forfeited after the Statute of *Westminster* 2. but only for the Life of the Tenant in Tail, till the Statute of 26 *H.* 8. 13.

[c] Fitz Entry congeable 28. 3 Co. 2, 3. 3 Inst. 19. [d] 3 Inst. 19. [e] 2 Roll. Abr. 34. pl. 1, 2. [f] 3 Inst. 19. [g] 3 Inst. 19. S. P. C. 187. Plow. Com. 554, 555. Dy. 289. pl. 55. Co. Litt. 130, 372, 391.

Sect. 6. It [h] seems, That the Profits of such Lands whereof a Person attainted of Felony is seised of an Estate of Inheritance in the Right of his Wife, or of an Estate for Life only in his own Right, are forfeited to the King, and that nothing thereof is forfeited to the Lord.

[h] 3 Inst. 19.

Sect. 7. It seems [i] agreed, That by Force of a special Custom a Copyhold of Inheritance may be forfeited by an Attainder or Conviction of Treason or Felony: Also it hath been [k] holden, That by Custom it may be forfeited for Treason or Felony, even without a Conviction; also it [l] seems the stronger Opinion, That it shall be forfeited by an Attainder of Treason or Felony of common Right, without any special Custom, but [m] not by a Conviction only.

Fitz. Assize, 166. Forfeiture, 23. [i] 4 Ass. pl. 4. [k] 2 Jon. 151. 1 Lev. 263. 1 Leon. 1. 1 Bulst. 13. 2 Brownl. 217, 218, 219, 220. *See* Godbolt, 267. [l] 2 Vent. 38, 39. 2 Jon. 189. 2 Ventr. 38, 39. [m] 1 Lev. 263. 2 Keb. 451. pl. 23.

Sect. 8. It seems [n] agreed, That by the Common Law upon an Attainder of Felony, the King had a Right utterly to waste the Lands holden of any but himself, whereof the Person attainted was seised of an Estate of Inheritance, either in his own or in his [o] Wife's Right. [p] And it is said by some, That the King had both this Right, and also a Right to hold such Lands for a Year and a Day; but it is holden by others, That the Right to hold over the Lands for a Year and a Day was given to the King in Lieu of the Waste; and this seems [q] implied in *Magna Charta, Ch.* 22. which saying, That the King shall not hold over the Lands of those convicted of Felony but for one Year and a Day, and making no mention of the Waste, seems plainly to intimate that at the Time of the making of that Statute the King was thought to have no other Right but only to the Year and Day. Yet the Statute of *Prærogativa Regis* made in the 17th of *Ed.* 2. having declared the King's Right to the Year and Day, and also to the Waste; it seems to have been the more general [r] Opinion since that Time that he hath a Right to both. Indeed if this Statute had been against the express Purview of *Magna Charta*, it would have been clearly repealed by those many subsequent Statutes which repeal all Statutes contrary to *Magna Charta*; but

[n] 4 Co. 124. b. S. P. C. 190, 191. Staundf. Prerog. 48, 49, 50. [o] Fitz. Coro. 327. Vide Fitz. Coro. 332.

[p] Vide 2 Inst. 36, 37. S. P. C. 190, 191. Staundf. Prerog. 48, 49, 50. [q] *See the Books abovecited, yet it seems admitted* 8 Ed. 3. Fitz. Traverse, 489. Prescription 50. *That the King was intitled to the Waste as to the Year and Day since this Statute.* [r] Bro. Coro. 206, 208, 209, 210. Fitz. Coro. 290, 308, 310, 312, 327, 358. Register, 165. Fitz Traverse, 19. S. P. C. 190, 191. Staundf. Prerog. 48, 49, 50 49 Ed. 3, 11. pl. 3 4 Co. 124. b. *But* 49 Ass pl. 21. *this contrary seems to be holden.* 2 Inst. 36, 37 Fitz. Utlagary, 2. *See also* Fitz. Coro. 285, 390, 332, 344. *and it seems agreed, That the King's Prerogative of the Waste is not grantable over, except only as to such Interests which by Vertue of it are actually vested in him.* Fitz. Coro. 310. S. P. C. 191. Lett. E. Staundf. Prerog. 50.

being not contrary to the expreſs Words of it, but only to what is argumentively drawn from it, it may be well argued that it is ſtill in Force.

As to the ſecond Point, *viz.* Where the Goods of the Offender ſhall be forfeited for Treaſon or Felony, I ſhall endeavour to ſhew,

Firſt, What Goods are liable to ſuch Forfeiture.
Secondly, In what Caſes.

Sect. 9. As to the firſt of theſe Particulars, it ſeems [a] agreed, That all Things whatſoever which are comprehended under the Notion of a perſonal Eſtate, whether they be in Action or Poſſeſſion, which the Party hath, or is intitled to in his own Right, and not as Executor or Adminiſtrator to another, are liable to ſuch Forfeiture.

Sect. 10. Alſo it [b] ſeems to be ſettled, That a Bond taken in another's Name, or a Leaſe made to another in Truſt for a Perſon who is afterwards convicted of Treaſon or Felony, are as much liable to be forfeited, as a Bond made to him in his own Name, or a Leaſe in Poſſeſſion.

Sect. 11. Alſo it [c] ſeems to be in a great Meaſure ſettled, That the Truſt of a Term granted by a Man for the Uſe of himſelf, his Wife and Children, *&c.* is liable in like Manner to be forfeited, if fraudulently made with an Intent to avoid a ſubſequent Forfeiture; but that it ſhall be forfeited ſo far only as it is reſerved to the Benefit of the Party himſelf, if made *bona fide*, whether before or after Marriage, for good Conſideration without Fraud, which is to be left to a Jury on the whole Circumſtances of the Caſe, and ſhall never be preſumed by the Court where it is not expreſsly found.

Sect. 12. It hath been [d] adjudged, That a Power of Revocation of the Truſt of a Settlement reſerved to the Grantor is not liable to be forfeited, if it depend on ſomething Perſonal to be done by the Grantor himſelf, as the making the Deed of Revocation under his own Hand and Seal.

2. Perſonal Things liable to Forfeiture ſhall be forfeited in the following Caſes.

Sect. 13. 1*ſt*, Upon a [e] Conviction of Treaſon or Felony.

Sect. 14. 2*ndly*, Upon a *fugam fecit* found before a Coroner, upon an Inquiſition of Death taken upon View of a dead Body; as to which it is [f] agreed, That where-ever a Perſon found Guilty by ſuch Inqueſt either as a Principal or as an Acceſſary [g] before the Fact, is found alſo to have fled for the ſame, he forfeits his Goods abſolutely, and the Iſſues of his Lands till he be acquitted or pardoned. Alſo it is [h] agreed, That where one indicted of any capital Felony, either as Principal or Acceſſary before or after, before Juſtices of *Oyer*, *&c.* is acquitted at his Trial, but found to have fled, he ſhall incur the like Forfeiture of his Goods but not of the Iſſues of his Lands, becauſe by the Acquittal the Land is diſcharged, and conſequently the Iſſues. And it hath been [i] holden,

[a] Staundf. Prerog. 45, 46. S. P. C. 187. D. Cro. Ca. 566. 12 Co. 121. *It is holden*, Staundf. Prerog. 45. b. *and* S. P. C. 188. Ch. 28. *That a Felon ſhall forfeit the Goods of others ſtolen by him, but the Authorities cited to this Point*, viz. 44 Ed. 3. 44. Fitz. Coro. 317, 318, 319, 323, 334, 379, 380. *do not ſeem fully to come up to it, except where ſuch Goods are waived, or of ſuch a Nature as not to be diſtinguiſhable from others of the like Kind, as Corn out of a Bag*, &c. Vide 2 Leon. 5, 6. 1 And. 19. Moor, 100. Dy. 309, 310. *That a Term limited to Executors, and not veſted in the Party himſelf, is not forfeitable.*

[b] Cro. Ja. 312, 313. Hob. 214 *and the Books cited to the following Section.*

[c] 2 Keb. 564, 608, 644, 763, 772. 1 Lev. 279. Lane, 54, 113. 1 Mod. 16, 38. Hardr. 466. 1 Ander. 294. Raym. 120. 2 Roll. Abr. 34. pl. 1, 2. 1 Roll. Abr. 343. F. 5, 6, 7. March, 45, 88. 1 Sid. 260, 403. 1 Keb. 909.

[d] 2 Keb. 564, 644, 763, 772. 1 Lev 279. 1 Mod. 16, 38. Vide infra, Sect. 26.

[e] 5 Co. 109. Supra ch. 33. Sect. 129. *and the Books cited to the three foregoing Sections.*

[f] S. P. C. 183, 184, 191, c. 192. a. H. P. C. 271. Staundf Prer. 46 Keilw 68. b Dyer 239. pl. 36. 5 Co. 110.

[g] Secus *if he be found Acceſſory after, for the Indictment is ſo far void.* S. P. C. 184. A. B. Supra ch. 9. Sect. 26. Keilw. 68. b. 5 Co. 110. Fitz. Forfeit. 35.

[h] S. P. C. 184. A. B. 191. G. H. P. C. 271.

[i] H. P. C. 271. S. P. C. 184. B. Fitz. Coro. 206.

den. That the Law is the same as to the finding of a *fugam fecit* upon an Acquittal of an Indictment of Petit Larceny. But it is [a] certain, That the Party may in all Cases, except that of the Coroner's Inquest, traverse the finding of a *fugam fecit*. Also it seems [b] agreed, That whenever the Indictment against a Man is insufficient, the finding a *fugam fecit* will not hurt him; and that in all Cases the Particulars of the Goods found to be forfeited may be traversed.

Sect. 15. 3*dly*, Upon a Default till the Award of an Exigent, as to which it is [c] agreed, That if one make such a Default either upon an Appeal or Indictment of a capital Felony, he forfeits his Goods unless he was pardoned before the Exigent was awarded; and it hath been [d] holden, That the Law is the same as to such a Default upon an Indictment of Petit Larceny: However it is clear, That where-ever Goods are so forfeited, they are not saved by an Acquittal at the Trial. But it seems [e] agreed That they are saved by a Reversal of the Award of the Exigent, for an Error either in Fact or in Law; as for the Imprisonment of the Defendant at the Time when the Exigent was awarded, or for a Defect in the Indictment, Appeal or Process.

Sect. 16. 4*thly*, Upon a [f] Presentment by the Oaths of twelve Men, That a Person arrested for Treason or Felony, fled from, or resisted those who had him in Custody, and was killed by them in the Pursuit or Scuffle.

Sect. 17. 5*thly*, By being [g] waived or left by a Felon in his Flight, from those who either actually do pursue him, or are apprehended by him so to do, whereby he forfeits the Goods so waived, whether they be his own [h] proper Goods, or the Goods of others stoll'n by him, which shall not be restored to the right Owners but upon a proper Prosecution, as hath been more fully shewn, *Chap.* 23. from *Sect.* 49 *to* 58.

Sect. 18. As to the second Particular, *viz.* What is forfeited by Statute: It is enacted by 26 *H.* 8. 13. *That every Offender and Offenders being hereafter lawfully convicted of any Manner of High Treasons by Presentment, Confession, Verdict or Process of Outlawry, according to the due Course and Custom of the Common Laws of this Realm, shall lose and forfeit to the King, his Heirs, and Successors, all such Lands, Tenements and Hereditaments, which any such Offender or Offenders shall have of any Estate of Inheritance in Use or Possession, by any Right, Title, or Means, within the Realm of* England, *or elsewhere within any the King's Dominions, at the Time of any such Treason committed, or any Time after. Saving to every Person and Persons, their Heirs and Successors, other than the Offenders in any Treasons, their Heirs and Successors, and such Person and Persons as claim to any their Uses, all such Rights Titles, Interests, Possessions, Leases, Rents, Offices and other Profits, which they shall have at the Day of committing such Treasons, or at any Time before, in as large and ample Manner as if this Act had never been had nor made.* And the same is enacted in near the same Words by 5 & 6 *Ed.* 6. 11.

Sect. 19. And it is farther enacted by 33 *Hen.* 8. *That if any Person or Persons shall be attainted of High Treason by the Course of the Common Laws, or Statutes of this Realm, in every such Case every such Attainder by the Common Law shall be of as good Strength, Value, Force and Effect, as if it had been done by Authority of Parliament; And that the King, his Heirs and Successors, shall have as much Benefit and Advantage by such Attainder, as well of Uses, Rights, Entries, Conditions, as Possessions, Reversions, Remainders, and all other Things*

[a] H. P. C. 271. 36 H. 6. 26. a. Vide supra, Ch. 9. Sect. 51, 52. Fitz. Coro. 22.

[b] H. P. C. 271. S. P. C. 184. 47 Ed. 3. 26. pl. 72. *Abridged* Fitz. Traverse, 18. Bro. Coro. 17.

[c] Fitz. Coro. 181. Forfeiture, 28. S. P. C. 183, 184. D. Staundf. Prerog. 47. Bro. Coro. 8. Finch 352. 1 Roll. Abr. 793. 41 Ass. pl. 13. 22 Ass. pl. 81.

[d] H. P. C. 271.

[e] 5 Co. 110. b. 111. 43 Ed. 3. 17, 18. H. P. C. 271. 1 Roll. Abr. 743. D. S. P. C. 184. D. Co. Litt. 259. Staundf. Prerog. 47. Cro. Ja. 464.

[f] 5 Co. 109 b. Fitz. Coro. 289, 290, 291, 312. S. P. C. 184. Lett. C. 189, 191. Lett. B. 192 A. 3 Inst. 56, 227. Plowd. Com. 260. b. *But* Staundf. *makes a Quære whether the Law in this Point be not altered by* 34 E. 3. 12. *taken Notice of above* Ch. 48. Sect. 25. Staundf. Prerog. 46. a.

[g] S. P. C. 186. Ch. 25. 5 Co. 109. Cro. Eliz. 611. pl. 18. 693. pl. 3. Ch. 25. *and* 29 E. 3. 29 b. *Abridged* Fitz. Avowry 253. *seems expres to this Purpose; but* 3 Inst. 109. b. *it is said, That the Felons proper Goods are not forfeited as Waifs, but as the Goods of a Fugitive.*

[h] S. P. C. 186. 227 *and* 5 Co.

as

as if it had been done and declared by Authority of Parliament, and ſhall be deemed and adjudged in actual and real Poſſeſſion of the Lands, Tenements, Hereditaments, Uſes, Goods, Chattles, and all other Things of the Offenders ſo attainted, which his Highneſs ought lawfully to have, and which they being ſo attainted ought or might lawfully loſe or forfeit if the Attainder had been done by Authority of Parliament, without any Office, or Inquiſition to be found of the ſame, any Law, Statute, or Uſe of the Realm to the contrary thereof in any wiſe notwithſtanding.

Sect. 20. *Saving to all and every Perſon and Perſons, and Bodies Politick, and their Heirs, Aſſigns and Succeſſors, and every of them (other than ſuch Perſon and Perſons which hereafter ſhall be attainted of High Treaſon, and their Heirs and Aſſigns and every of them, and all and every other Perſon and Perſons, claiming by them or any of them, or to their Uſes, or to the Uſes of any of them after the ſaid Treaſons committed,) all ſuch Right, Title, Uſe, Poſſeſſion, Entry, Reverſions, Remainders, Intereſts, Conditions, Fees, Offices, Rents, Annuities, Commons, Leaſes, and all other Commodities. Profits and Hereditaments, whatſoever they or any of them ſhould, might or ought to have had if this Act had never been had nor made.*

In the Conſtruction of theſe Statutes the following Points ſeem moſt conſiderable.

[a] S. P. C. 187. 3 Inſt. 19. Dyer 28.

Sect. 21. 1*ſt*. It is [a] ſettled, That they are not repealed by 1 *Ma. Seſſ.* 1. *ch.* 1. which enacts, *That no Pains of Death, Penalty, or Forfeiture in any wiſe enſue or be to any Offender or Offenders, for the doing or committing any Treaſon, Petit Treaſon or Miſpriſion of Treaſon other than ſuch as be in the Statute* 25 Ed. 3. *ordained and provided*; for the Words, *other than ſuch as be within the Statute of* 25 *Ed.* 3. *&c.* ſhall not be taken to refer to the Pains, Penalties and Forfeitures which are mentioned in the Beginning of the Sentence, but to Treaſons, Petit Treaſons, and Miſpriſion of Treaſon, which are laſt mentioned.

[b] S. P. C. 187. Co. Litt. 372, 391. *and the Books cited to the following Sections.*

Sect. 22. 2*ndly*, It is [b] agreed, That Eſtates in Tail are forfeited by Force of thoſe Words in 26 *H.* 8. *of any Eſtate of Inheritance*, which muſt be void if they do not include Eſtates in Tail, for Eſtates in Fee-ſimple were forfeited before. Alſo it hath been [c] adjudged, That where Lands are given to a Man and his Wife, and the Heirs of their two Bodies, the Intail is forfeited by his Attainder, and the Heir as much diſabled as if the Gift had been made to the Heirs of his Body in general.

[c] Dy. 322. pl. 27. [d] 3 Co. 2, 3. 1 Leon. 270, 271. Moor, 125. Hob. 340, 341. Cro. Eliz 389. *cited and agreed*, Cro. Ca. 428. 7 Co. 13. Moor, 323. Litt. Re. 100. [e] 3 Co. 2, 3. Hob. 340, 341. 7 Co. 13. 4 Co. 58. a. [f] 3 Co. 2, 3, 10. [g] 3 Co. 11. a. 4 Co. 58 a. 1 Leon. 21. 9 Co. 95. a. Supra, Sect. 1, 2.

Sect. 23. 3*dly*, It was [d] ſettled in the Marqueſs of *Wincheſter*'s Caſe, That the Right to a Writ of Error to reverſe an erroneous Common Recovery is not forfeited by theſe Statutes; alſo it is [e] agreed, That a meer Right of Action to Lands in the Hands of a Stranger, as of a Diſcontinuee, or of the Heir of a Diſſeiſor, is not forfeited: [f] But, That a Right of Entry into Lands to which a Perſon attainted of High Treaſon is intitled, is as much forfeited as Lands in Poſſeſſion, but yet that the King ſhall [g] not be adjudged in Poſſeſſion of ſuch Lands without an Office, and *Scire facias*, or Seizure on ſuch Office; for the Words, *That the King ſhall be deemed in Poſſeſſion without Office* ſhall have this Conſtruction, That he ſhall be in Poſſeſſion without Office in the ſame Manner as he ſhould have been upon an Office found at Common Law: But at the Common Law if a Diſſeiſee had been attainted of High Treaſon, and the Seiſin found by Office, the King ſhould not have been in Poſſeſſion, without a *Scire facias*, or a Seiſure at leaſt.

Sect. 24 4*thly*, After two contradictory Judgments upon the same Point, it was at last [a] settled, by a Majority of the Judges in *Stone* and *Newman*'s Case, That where a Tenant in Tail of the Gift of the Crown makes a Feoffment in Fee, the Reversion being still in the Crown, and afterwards is attainted of High Treason, the Right of the Intail is forfeited to the Crown; because the Reversion continuing always in the Crown, ter the Intail could not be discontinued, but the Heir might have entered after the Death of the Feoffor without bringing any Action; and tho' the Intail by such a Feoffment be put in Abeyance as to any Benefit which the Feoffor himself may claim from it; yet since it is not turned to a Right of Action, and wou'd have continued still in him for the Benefit of the Heir, if he had not been attainted, (as appears from the Form of a Writ of *Formedon*, which supposes that the Right descended to the Heir from the Feoffor, and consequently that it was in him at his Death,) it shall likewise continue in him for the Benefit of the King.

[a] Cro. Ca. 427. Vide Plowd. Com. 552.

Sect. 25. 5*thly*, It was solemnly adjudged in the Exchequer-Chamber in [b] *Sheffield*'s Case, and a Judgment to the contrary in the Exchequer reversed, That where one attainted of High Treason is seised of a defeasible Estate in Tail, and hath at the same Time a Right to an ancient Intail which is discontinued, he forfeits both the Intail in Possession, and the Right to the old Intail; for the first is within the express Words of 26 *H.* 8. and the latter within those of 33. And it by no Means follows, that because naked Rights of Action to Lands in the Hands of the Heir of a Disseisor, or of a Discontinuee, are not within the Meaning of the Statute, as it is [c] settled that they are not; therefore also a Right to Lands in the Hands of the Person attainted himself is not within the Meaning of it; for the Forfeiture of such naked Rights, might not only be of dangerous Consequence in unsettling Possessions, but might also be highly prejudicial to Strangers whom the Statute by an express Saving plainly intends to favour; but the Forfeiture of the Offender's Right to his own Lands can be of no Prejudice to any but himself and his Heirs, to whom the Statute is so far from intending any Favour, that it expressly excludes them from all the Benefit of the saving Clause.

[b] Hob. 334, &c. Palmer, 351, &c. 2 Rol. Rep. 305, &c.

[c] Supra Sect. 23.

Sect. 26. 6*thly*, It seems [d] agreed, That a Power of revoking the Uses of a Settlement may be forfeited by Force of 33 *H.* 8. if the Execution of it require nothing but what may be as well performed by any other Person, as by the Party himself, by whom it was reserved, as the Tender of a Ring, *&c.* Also it was adjudged in [e] *Englefield*'s Case, That the Mention of such Considerations and Inducements for the reserving of such a Power of Revocation in the Preamble of it, as are inseparable from the Person, do not alter the Case if nothing of this Kind be inserted in the Proviso it self, by which it is reserved. But it is agreed, That if the Proviso by which such a Power is reserved require something inseparably annexed to the Person, it keeps it out of the Statute; and therefore in the [f] Duke of *Norfolk*'s Case, where there was this Proviso, That if the Duke should be minded to alter and revoke the Uses, and signify his Mind in Writing under his Hand and Seal, that then, *&c.* it was clearly adjudged, That the Power of Revocation was not forfeitable, because it depended on the Duke's signifying his Mind in Writing under his proper Hand and Seal, which none but himself could do. Also it was adjudged in [g] *Main*'s Case, That the Law is the same where such Proviso doth not expressly require the Party's signifying a Change of Mind, but only that the Deed of Revocation be under his proper Hand

[d] 7 Co. 12, 13. Poph. 18. 1 And. 293. Moor 303. 4 Leon. 135. Palmer, 433, &c. 1 Ro. Rep. 142.

[e] 7 Co. 12. *and the other Books above-cited, Cited and agreed* 2 Keb. 566, 763, 773. 1 Lev. 279. Lane, 44. 1 Rol. Rep. 142.

[f] 7 Co. 13. *Cited and agreed* 1 Lev. 279. 2 Keb. 566, 763, 773. 3 Inst. 19.

[g] Supra, Sect. 12.

[a] Palmer, 429. Hand and Seal. [a] But if such Proviso require only the Tender of a Ring by the Feoffor, *ipso adtunc declarante* that the Tender is to the Intent to avoid the Feoffment, it seems unsettled, whether it come within the same Construction.

[b] Plow. Com. 381, 382. [c] Plow. Com. 379, &c [d] Plow. Com. 379. *Sect.* 27. 7*thly*, It [b] seems, That an Annuity granted to a Man *pro consilio impendendo*, is not forfeitable by these Statutes; Also it seems [c] doubtful whether an Office granted to a Man for Life, and requiring Skill and Confidence, be forfeitable; but if it be [d] granted in Fee, it seems clear that it may be forfeited even by the Common Law; because the Grantor in giving such an Estate, which shall descend to all the Heirs of the Grantee however unqualified, seems plainly not to have been induced to make his Grant from any Consideration of the peculiar Merit of the Persons who are to execute the Office.

[e] 2 Lev. 169. 3 Keb. 459, 651, 712. 2 Mod. 130, 131. 2 Jon. 57. [f] Co. Litt. 130, *and the Books abovecited.* *Sect.* 28. It hath been [e] adjudged, but not without great Difficulty, That an Act of Parliament that certain Persons shall forfeit all their Lands, Possessions, Rights, Interests and Hereditaments, and other Things of what Nature soever, extends to Estates in Tail, by Force of the Words *all Interests of what Nature soever.* Yet it is [f] agreed, That the Statutes of *Præmunire*, which give a general Forfeiture of all the Lands and Tenements of the Offender extend not to Land in Tail.

[g] H. P. C. 8. 3 Inst. 47, 90. Salk. 85. *Sect.* 29. It is [g] holden, That a Saving against the Corruption of Blood in a Statute concerning Felony, doth by a necessary Consequence save the Land to the Heir; because the Escheat to the Lord for Felony is only *pro defectu tenentis*, occasioned by the Corruption of Blood. Also it is holden, That a Saving of the Land to the Heir prevents the Corruption of Blood, and also the Loss of Dower. But it hath been [h] adjudged, That a Saving against the Corruption of Blood in a Statute concerning Treason doth not save the Land to the Heir, because in Treason the Land goes to the King by way of immediate Forfeiture, and not by Escheat.

[h] Salk. 85.

[i] Fitz. Forf. 3. 30. 30 H. 6. 5. a. S. P. C. 192. ch. 31. Fitz. Counterplea de voucher, 30. Co. Litt. 2. b. 8 Co. 170. 38 Ed. 3. 32. a. Plow. Com. 488. b. [k] Fitz. Forfeiture 30. Staundf. Prerog. 48. S. P. C. 192. ch. 31. Bro. Relation, 31. Exposition, 26. *Sect.* 30. As to the third Particular, *viz.* To what Time the Forfeiture shall relate: It seems [i] agreed, That the Forfeiture upon an Attainder either of Treason or Felony, shall have Relation to the Time of the Offence, for the avoiding of all subsequent Alienations of the Lands, but to the Time of the [k] Conviction, or *fugam fecit* found, *&c.* only as to Chattels; unless the Party were [l] killed in flying from or resisting those who had arrested him; in which Case it is said, That the Forfeiture shall relate to the Time of the Offence.

[m] 38 Ed. 3. 32. a. *Sect.* 31. But it seems [m] unsettled, Whether in *Præmunire* it shall relate to the Time of the Offence, or only to that of the Judgment.

[n] 8 Co. 170. Plowd. Com. 488. b. 38 Ed. 3. 32. a. *Sect.* 32. It seems the better [n] Opinion, That no Attainder whatsoever shall have any Relation as to the mean Profits of the Lands of the Person attainted, but only from the Time of the Attainder.

[o] Bract. B. 3. Ch. 8. Sect. 5. *and* Ch. 18. Sect. 1, 2. Fleta, B. 1. Ch. 26. Forfeit. 119. Car. 172, 173. S. P. C. 191. Coro. 374. Sect. 1, 2. Vol. 4. fol. 65, 66, 454. *Sect.* 33. As to the fourth Particular, *viz.* What shall be done with the Goods of an Offender both before and after they are actually forfeited: It seems to have been always [o] agreed, That one indicted or appealed of Treason or Felony may *bona fide* sell any of his Chattels real or

[l] Vide supra Sect. 16. S. P. C. 192. a. Fitz. Coro. 290. [m] Cro. 1 Jon. 217. [n] 8 Co. 170. Plowd. Com. 488. b. 38 Ed. 3. 32. a. *But this is made a Quære* Lett. D. *and the contrary seems holden*, Fitz. Coro. 290, 344. *See also* Fitz. Forfeiture, 16. Finch 326, 327. [o] Bract. B. 3. Ch. 8. Sect. 5. *and* Ch. 18. Sect. 1, 2. Fleta, B. 1. Ch. 26. 8 Co. 171. b. 7 H. 4. *in the last Case.* S. P. C. 193. a. State Trials, Vol. 1. fol. 994, 995.

perſonal for the Suſtenance of himſelf and Family until they be actually forfeited.

Sect. 34. Alſo it ſeems [a] agreed, That the Goods of ſuch Perſon can in no Caſe be lawfully removed out of his Houſe until they be forfeited.

Sect. 35. Yet according to the general Tenour of the old [b] Books, the Goods of one [c] arreſted for Treaſon or Felony, may by the Purview of an ancient Statute, which * ſeems to continue ſtill in Force, be immediately inventoried and appraiſed, after which, and on Surety found that they ſhall be forth-coming, they ſhall be kept by the Bailiffs of the Party arreſted, and for want of ſuch Surety by his Neighbours, till he be convicted, or found to have fled, *&c.* whereby they are actually forfeited.

Sect. 36. Alſo it was enacted by the Statute *de Officio Coronatoris*, (ſet forth more at large, *Ch.* 9. *Sect.* 19, 20.) That where one is found guilty of Murder by a Coroner's Inqueſt upon View of a dead Body, the Coroner ſhall inquire what Goods he hath, and cauſe them to be valued and delivered to the Townſhip, *&c.* But ſo much of this Statute as enables the Coroner to ſeiſe the Goods, [cc] ſeems to be repealed by 1 *Rich.* 3. (ſet forth more at large *Sect.* 38.) unleſs the Party indicted be found alſo to have fled.

Sect. 37. Alſo it was enacted by 25 *Ed.* 3. 14 (ſet forth more at large *Ch.* 27. *Sect.* 116.) That in the ſecond *Capias* given by that Statute on the Return of a *Non inventus*, it ſhall be compriſed, That the Sheriff ſhall cauſe the Party's Chattels to be ſeiſed, and ſafely kept till the Day of the Writ or Ptecept returned, *&c.* and this is ſtill in [d] Force notwithſtanding the Statute of 1 *R.* 3. 3. for this prohibits only the ſeiſing of the Goods of thoſe who are arreſted; and ſo far as it relates to this Purpoſe, is enacted as followeth.

Sect. 38. *And that no Sheriff, Under-Sheriff nor Eſcheator, Bailiff of Franchiſe, nor any other Perſon, take or ſeiſe the Goods of any Perſon arreſted or impriſoned for Suſpicion of Felony, before that the ſame Perſon ſo arreſted and impriſoned be convicted or attainted of ſuch Felony according to the Law, or elſe the ſame Goods otherwiſe lawfully forfeited, upon Pain to forfeit the double Value of the Goods ſo taken, to him that is ſo hurt in that Behalf, by* [e] *Action of Debt*, &c.

Sect. 39. This Statute is ſaid to be in [f] Affirmance of the Common Law, and hath been [g] adjudged to extend as well to the Seizure of Money as of any other Chattel.

Sect. 40. It ſeems plain from this Statute, That Goods may be ſeiſed as [h] ſoon as they are forfeited; and it ſeems the whole Townſhip is anſwerable [i] for them to the King, and may ſeiſe them [k] where-ever they can be found.

[a] *See the Citations to the foregoing and following Section.*

[b] Fleta, B. 1: ch. 26. S. 2. Bract. B. 3. ch. 18. S. 2. Britton, f. 4. S. P. C. 52. Lett. C. 192. Lett. B. Staundf. Prerog 47, b. 48. a.

It is ſaid 26 Aſſ. pl. 32. *Abridged* Bro. Coro. 102. *That Juſtices of* Oyer, &c. *ſhall put the Chattels of Felons in Eſtreat preſently*, &c. *and deliver them to the Towns*, &c. *to anſwer to the King in* Eyre. *But this ſeems intended of the Chattels of one convict of Felony.*

And in 44 Aſſ. pl. 13. *and* 43 E. 3. 24. pl. 1. *Abridged* Bro. Coro. 9. Forfeiture, 7. Reſeiſer, 3. Office *and* Officer, 3. Fitz. Treſp. 7. Bar, 196. *the* 2d, *it is ſaid, That no Miniſter of the King ought to take the Chattels of an Appellee of Felony away with him, but to ſeiſe them, he ought to deliver them to the Neighbours*, &c. *And in the laſt Caſe of* 7 H 4. *Abridged* Fitz Coro. 83. *and* Bro. Forfeit. 10. *It is ſaid, That where one is indicted of Felony until he be attainted, his Goods ſhall not be removed out of his Houſe, but ſhall be kept by his Neighbours until*, &c. *and in the mean Time the Felon ought to live upon his Goods,* Vide 41. Aſſ. pl. 13. *Abridged* Fitz. Proceſs, 183. Bro. Forfeiture, 40. 13 H. 3. 13. pl. 6. *in which Books it is ſaid, That Goods ſhall not be ſeiſed till they be forfeited* [c] *The old Writ recited* Bract. B. 3. Ch. 18 Sect. 2. *and* Fleta, B. 1. ch. 26. Sect. 2 *is expreſs to this Purpoſe, Yet in* 3 Inſt. 228 *it is ſaid, That the Goods of any Delinquent cannot be inventoried, and the Town charged therewith before the Owner is indicted of Record; and a Note in* H. P. C. 269 *ſeems to be to the ſame Effect.* * State Trials, Vol. 1. fol. 994, 995. Vol. 4 fol. 65, 66. S P. C 139. [cc] S.P. C. 52. Lett. C. [d] S P. C. 193. Staundf. Prerog. 48. [e] *For Precedents of ſuch Actions, See* 1 Lutw. 132. Cro. Eliz. 749 [f] Vide ſupra, S. 33, 35, 34. S.P.C. 193. [g] Raym. 414. [h] Co. Litt. 391. [i] Fitz. Coro. 300, 347. 366. 13 H. 4. 13 pl. 6. *Abridged* Fitz. Forfeit. 32. 22 Aſſ. pl. 81. *Abridged* Fitz Coro. 181. Bro. Charge, 45. Forfeiture, 32. S P. C. 193. B. 194. A. B. Staundf. Prerog. 47. b. 47 E. 3. 26 a. b. [k] 22 Aſſ. pl 81. *Abridged* Fitz. Coro. 181. Bro. Charge, 45. Forfeiture 32. Staundf. Prerog. 47. b.

Sect.

[1] Fitz. Coro. 300, 347. S. P. C. 194. Lett. B.

Sect. 41. And at the Common Law it was no [1] Plea for such Townſhip, That the Goods were delivered to the Cuſtody of *J. S.* who imbezilled them, *&c.* But it is enacted by 31 *E.* 3. 3. *That if any Man or Town be charged in the Exchequer by Eſtreats of the Juſtices of the Chattels of Fugitives and Felons, and will alledge in diſcharge of him another which is chargeable, he ſhall be heard, and Right done to the other.*

[a] S. P. C. 194. D. Co. Litt. 31, a, 37, a. 41, a. 392. b. Litt. §. 747. 3 Inſt. 47, 211. [b] Co. Litt. 37. a. 41. a. S. P. C. 195. A. Bract. 311. pl. 13. [c] Co. Litt. 41. a. Bract. 311. pl. 13. Winch, 27. [d] Bract. 311. pl. 13. [e] Co. Litt. 41. a. [f] Co. Litt. 31. a. [g] 3 Inſt. 216. Savil, 54, 55. Co. Litt. 41. a. Benl. 55, 56, 57. Dy. 140. pl. 42. Moor, 639. pl. 879. Cont. *by* Vaſor. Litt. Sect. 55. [h] 1 Leon. 3. [i] Co. Litt. 37. 3 Inſt. 216. Bract. 129. pl. 14. 130. pl. 33. [k] Bract. 129. pl. 14. Supra Sect. 8. Cont. Bract. 130, pl. 23. [l] 3 Inſt. 216. Moor, 639. pl. 879. [m] S. P. C. 195. Dyer, 140. pl. 42. Co. Litt. 37. a. 392. b. [n] 3 Inſt. 211. S. P. C. 195.

Sect. 42. As to the ſecond Point, *viz.* Where the Wife loſes her Dower: It is agreed, That before the Statute of 1 *Ed.* 6. *ch.* 12. the Wife not only loſt her Dower at Common [a] Law, but alſo her Dower [b] *ad oſtium eccleſiæ*, or *ex aſſenſu patris*, or by Special [c] Cuſtom (except that of [d] Gavelkind) by an Attainder of any Treaſon or [e] capital Felony, whether [f] committed before or after the Marriage, and whether the Land were in the Hands of a [g] Feoffee, or forfeited to the King, or eſcheated to the Lord of the Fee: And tho' the [h] Attainder were pardoned, *&c.*

Sect. 43. But it [i] ſeems that the Wife never forfeited Lands given jointly to her Husband and her, whether by way of Frank-marriage or otherwiſe, but only [k] for the Year and Day and Waſte.

Sect. 44. Alſo it hath been [l] adjudged, That if a Husband having levied a Fine with Proclamations, is afterwards erroneouſly attainted of High Treaſon, and the five Years paſs after his Death, and then the Outlawry is reverſed, the Wife may purſue her Title of Dower within five Years after ſuch Reverſal; becauſe being barred of her Dower by the Attainder while it ſtood in Force, which Attainder ſhe could no way reverſe, ſhe had no Remedy to purſue her Title of Dower within the five Years, and therefore ſhall not be barred by her Non-claim.

Sect. 45. It is enacted by 1 *Ed.* 6. 12. *Par.* 17. *That albeit any Perſon ſhall be attainted of any Treaſon or Felony whatſoever, yet that notwithſtanding every Woman that ſhall fortune to be Wife of the Perſon ſo attainted, ſhall be endowable and enabled to demand, have, and enjoy her Dower in like Manner and Form as tho' her Husband had not been attainted*, &c.

Sect. 46. But this is repealed as to Treaſon by 5 *&* 6 *Ed.* 6. 11. *Par.* 9. by which it is enacted, *That the Wife whoſe Husband ſhall be attainted of any Treaſon whatſoever, ſhall in no wiſe be received to ask, challenge, demand, or have Dowry of any the Lands, Tenements, or Hereditaments of the Perſon ſo attainted during the ſaid Attainder in Force.* And this hath been conſtrued [m] to extend as well to an Attainder of Petit Treaſon, as of High Treaſon.

As to the third Point, *viz.* How far the Blood is corrupted by an Attainder of Treaſon or Felony, the following Particulars ſeem moſt remarkable.

Sect. 47. 1*ſt*, It is [n] agreed, That by [o] ſuch an Attainder, the Blood is ſo far ſtained or corrupted that the Party loſes all the Nobility or Gentility he might have had before, and becomes ignoble.

Sect. 48. 2*ndly*, It is alſo [p] agreed, That he can neither inherit as Heir to any Anceſtor, nor have an Heir.

Sect. 49. 3*dly*, It is alſo farther [q] agreed, That where-ever it is neceſſary for any one who would make a Title to another, to derive the De-

[o] *But an Attainder of Piracy,* (B. 1. Ch. 37. Sect. 6, 8. Co. Litt. 391.) *or Petit Larceny corrupts not the Blood.* B. 1. Ch. 33. Sect. 36. 3 Inſt. 211. Co. Litt. 41. a. Noy, 170. [p] Co. Litt. 8. a. 391. b. 392. B. Bro. Nonability, 21. Coro. 60. [q] Cro. Ca. 543. Litt. Rep. 28. 1 Vent. 413, 417. Noy, 159, 166, *&c.* 1 Lev. 60. 1 Sid. 200, 201.

ſcent thro' him, the Attainder is a Bar to ſuch Title, [a] unleſs the Land were intailed. And therefore if there be Grandfather, Father and Son, and the Father be attainted, it is clear, That the Son [b] cannot claim as Heir to the Grandfather of the Lands in Fee-ſimple, becauſe he muſt of Neceſſity derive the Deſcent thro' the Father, which by Reaſon of the Attainder he cannot do. And for the ſame Reaſon, if there be two Brothers, and one of them having iſſue a Son be attainted, and either the Son or Uncle purchaſe Land and die without Iſſue, the other [c] cannot be his Heir, becauſe the Blood of the Father thro' whom the Deſcent muſt be convey'd, is corrupted. But it ſeems a [d] general Rule, That the Attainder of a Perſon who needs not be mentioned in the Conveyance of the Deſcent, does no hurt, let the Anceſtor be never ſo remote; and *a fortiori* therefore it ſeems clearly to follow, That where one may claim as immediate Heir to another, without deriving the Deſcent thro' any other, he ſhall not be barred by the Attainder of any other. And therefore it ſeems [e] agreed, That if the Son of one attainted purchaſe Land, and have a Son and die, ſuch Son ſhall inherit him, becauſe he derives his Deſcent immediately from him. And for the like Reaſon it hath been [f] ſettled, That if a Man hath two Sons, and then be attainted, and one of the Sons purchaſe Lands and die without Iſſue, the other ſhall be his Heir, becauſe he may make his Title without mentioning the Father.

But Sir *Edward Coke* [g] ſays, That the Reaſon of this Caſe is, *becauſe the Attainder of the Father corrupts only the lineal Blood, and not the collateral Blood between the Brethren which was veſted in them before the Attainder*; but he ſaith, *That ſome have holden that if a Man after he be attainted have Iſſue two Sons, the one cannot be Heir to the other, becauſe they could not be Heir to their Father, for that they never had any inheritable Blood in them.* But the Ground of this Opinion ſeems to be overthrown by the Reſolution in the Caſe of *Collingwood* and *Pace*, wherein it was adjudged [h] in the Exchequer-Chamber by ſeven Judges againſt three, That the Sons of an Alien might be Heirs to one another if born in *England* or naturalized; and yet it is certain that they could not be Heirs to their Father. Alſo it ſeems to [i] be the better Opinion, That where a Perſon attainted hath Iſſue by a Woman ſeized of Lands of Inheritance, ſuch Iſſue may inherit the Mother, tho' he never had any inheritable Blood from the Father.

Sect. 50. 4*thly*, It ſeems clear, That notwithſtanding a Perſon attainted be to many Purpoſes looked upon as dead in Law, yet he hath a Capacity to [k] purchaſe Land, which the King ſhall have upon Office found. Alſo if the Father of a Perſon attainted die ſeiſed of an Eſtate of Inheritance during his Life, no [l] younger Brother can be Heir, but the Land ſhall rather eſcheat; for the elder Brother, tho' attainted, is ſtill a Brother, and no other can be Heir to the Father while he is alive: But it ſeems [m] agreed at this Day, That if he die before the Father, the younger Brother ſhall be Heir.

[a] 3 Co. 10. b. Litt. S. 746, 747.
[b] 8 Co. 166. a. 1 Vent. 416, 418. Daliſ. 14 pl. 3. Co. Litt. 392.
[c] Cro. Ca. 543. Dy. 274. pl. 40. 1 Vent. 413, 416, 425.
[d] Cro. Ca. 543. 1 Vent. 413, 417, &c. Litt. Re. 28. Noy, 159, 166, &c. 1 Lev. 60. 1 Sid. 200, 201. Vide Bract. B. 3. Ch. 14. Sect. 17.
[e] 1 Vent. 416.
[f] Co. Litt. 8. a. 4 Leon. 5. Cro. Ja. 539. 1 Roll. Abr. 625, pl. 5. Cro. Ca. 543. 1 Vent. 425. Palm. 19. 1 Lev. 59. 2 Rol. Re. 93. 2 Sid. 25, 27. *This is left doubtful* Moor 569 pl. 775. Noy, 158, &c. Cont. Litt. Rep. 28.
[g] Co. Litt. 8. a. 1 Rol. Abr. 625. pl. 5.
[h] 1 Sid. 193. Hard. 224. 1 Vent. 413. 1 Lev. 59.
[i] 1 Sid. 201. 1 Vent. 422, 426. Noy 159, 167, 168, 169. 2 Sid. 248. *This alſo appears from* 13 H. 7. 17. *cited* S. P. C. 196.

Abridged Bro. Tenant by Curteſy, 15. *and wherein it is holden, That if the Husband of an Inheritrix have Iſſue, and be attainted of Felony and pardoned, he ſhall not be Tenant by Curteſy by Reaſon of the Iſſue born before the Pardon, but by Reaſon of Iſſue born after he ſhall; from whence it neceſſarily follows, that ſuch Iſſue muſt be inheritable to the Wife. Alſo it is admitted,* Co. Litt. 84 b *That the Iſſue of an Inheritrix by an Alien or a Perſon attainted may be in Ward, which could not be unleſs he could inherit the Mother.* Vide Cro. Ja. 539. Litt. Rep. 28. 1 Lev. 59, 60. *But the contrary was anciently holden.* 3 Co. 41. Bract. B. 3. Ch. 13. Sect. 19, 20.
[k] Co. Litt. 2. b.
[l] Fleta B. 1. Ch. 28. Sect. 9. Co. Litt. 8. a. 13. a. Bro. Mordanceſter, 36. S. P. C. 195. B. Bract. B. 5. Ch. 6. Sect. 7. Fitz. Petition, 20. Mordanceſter, 28. Diſcent, 7. 1 Vent. 413, 417. 1 Lev. 60. Deſcent, 17. 29 Aſſ. pl. 11. Noy 166, 170. 1 Sid. 195. 26 Aſſ. pl. 2.
[m] *See the Books next above cited, and* Bro. Diſcent, 64. Cont. Bract. B. 3. Ch. 14. Sect. 17.

Sect. 51. *5thly*, It is clear, That the Corruption of Blood from an Attainder is so high that it cannot be absolutely salved but by Act of Parliament; for it seems [a] agreed, That the King's Pardon cannot restore the Blood so as to make the Person attainted capable either of inheriting others, or of being inherited himself by any one born before the Pardon. [b] Yet if such Person have a Son born after the Pardon, and purchase Lands and die, such Son may be his Heir, unless he have an elder Brother alive born before the Pardon; for a Pardon doth as it were make a Man a new Creature, and give him a new Capacity, in Respect whereof his Issue born after the Pardon may be his Heirs, as to Lands purchased after the Pardon, in the same Manner as if he had never been attainted.

[a] Co. Litt. 8. a. 391. b. 392. a. S. P. C. 195. B. 3 Inst. 233. Dalis. 14. pl. 3. Cont. 9 H. 5. 9. a.

[b] *See the Books next above-cited.*

CHAP. L.

Of avoiding Judgments in Criminal Cases.

FOR the better understanding the Learning concerning the avoiding of Judgments in criminal Cases, I shall endeavour to shew,

1. How such Judgments may be avoided.
2. The Effect of such Avoidance.

And first, such Judgments may be avoided either,

1. Without Writ of Error.
2. By Writ of Error.

They may be avoided without Writ of Error two Ways.

1. For Faults apparent in the Record.
2. For other Matters *dehors* the Record.

Sect. 1. And first I shall endeavour to shew where such Judgments may be avoided by Plea without any Writ of Error for Faults apparent in the Record; as to which it is observable, That notwithstanding it be the allowed Practice of the Court of Common Pleas to suffer a Defendant coming in by [c] *Capias Utlagatum* the same [d] Term in which an Exigent is returnable, to avoid the Outlawry without Writ of Error, by shewing that he purchased a [e] *Supersedeas* out of the [f] same Court, and

[c] Co. Litt. 259. b. 1 And. 36. pl. 92. Vide infra, Sect. 9. Secus *if he comes in gratis.*

Dyer 192. pl. 25. Cont. 39 H. 6. 27. b. *Abridged* Fitz. Responder, 52. Bro. Utlagary, 35. Vide 14 H. 4. 27. a. b. Fitz. idempnitate nominis, 3. Bro. Uulagary, 28. 30 H. 6, 3. a. [d] 8 H. 6, 37. pl. 8. *Abridged* Fitz. Error, 19. 19 H. 6, 2. a. *Abridged* Fitz. Error, 26. *But some have holden, That an Outlawry cannot be avoided for this or any other Cause in another Term.* Co. Litt. 259. b. 37 H. 6, 17. a. b. *Abridged*, Fitz. Utlagary, 28. Bro. Error, 97. 37 H. 6, 17. a. b. *Abridged* Fitz. Utlagary, 28. Bro. Error, 97. 8 H. 6. 37 a. b. Con. *adjudged* 1 And. 36. pl. 93. [e] 19 H. 6. 44. a. b. *Abridged*, Fitz Utlagary, 20 Bro. Utlagary, 21. 33 H. 6. 1. b. *Abridged* Fitz. Utlagary, 27. Bro. 2. 30 H. 6, 3. a. *Abridged* Fitz. Protection, 11. Bro. Utlagary, 74. 12 H. 4. 18. a. *Abridged* Bro. Utlagary, 14. 7 H. 4, 1. a. *Abridged* Bro. Utlagary, 5. 8 H. 6, 7. a. b. Fitz. Error, 42. 11 H. 4. 34. 33 H. 6. 1. b. 45. a. *Abridged* Fitz. Utlagary, 27. 1 And. 36. pl. 93. *But* 1 Roll. Abr. 743. pl. 2. *the contrary is said to have been holden* 39 Eliz. [f] 30 H. 6, 3. a. *Abridged* Fitz Protection, 11. Secus *if the* Supersedeas *were from the Chancery*, 7 H. 4, 5. b. *Abridged* Fitz. Supersedeas, 10. Bro. Utlagary, 65. Supersedeas, 8. Vide 18 H. 6, 18. a. b. *Abridged* Fitz. Error 24. 7 Ed. 4. 9. b. *Abridged* Fitz. Exigent, 1. Bro. Supers. 31. F. N. B. 236. A.

[a] delivered it to the Sheriff before the *quinto exactus, &c.* or by ſhewing any [b]other Matter apparent on Record which makes the Outlawry erroneous, as the Want of an [c] Original, or the [d] Omiſſion of Proceſs, or Want [f] of Form in a Writ of Proclamation, *&c.* or a [g] Return by a Perſon appearing not to be Sheriff, or a [h] Variance between the Original and Exigent or other Proceſs, or the Want of ſuch Addition as is [i] required by 1 *H.* 5. Yet it is ſaid in many [k] Books, to be the conſtant Courſe of the Court of King's Bench, never to reverſe an Outlawry on the Crown-ſide either in the ſame or a different Term, for [l] theſe or other Errors of the like Nature (as the [m] Want of a *Capias* to the Sheriff of the County where of the Party is named, or a [n] Fault in the Indictment) without a Writ of Error; yet ſince Sir *Edward* [o] *Coke* ſeems to be of another Opinion, and ſince alſo it is clearly holden, That one may plead even a Matter of Fact in the King's Bench in Avoidance of an Outlawry of Felony which cannot be pleaded in Avoidance of any other Outlawry, as ſhall be more fully ſhewn, *Sect.* 6. I ſhall leave this Point to be farther conſidered. However it is [p] agreed, That a Conviction of Felony whereon the Party hath had his Clergy may be diſcharged by Exception to the Indictment, becauſe no Writ of Error lies of ſuch a Conviction, not being a Judgment.

Sect. 2. As to the ſecond Particular, *viz.* Where a Judgment may be avoided without Writ of Error for Matters *dehors* the Record, it is holden, That he who purchaſes Land of a Perſon who afterwards is [r] outlawed of Felony, or condemned upon his own [ſ] Confeſſion, may falſify the Record not only as to the Time wherein the Felony is ſuppoſed to have been committed, but alſo as to the Point of the Offence. But it is [t] agreed, That where a Man is found guilty by Verdict, a Purchaſer cannot falſify as to the Point of the Offence, but that he may falſify for the Time where the Party is found Guilty generally of the Offence in the Appeal or Indictment; becauſe the Time is not material upon Evidence.

Sect. 3. Alſo it ſeems [u] agreed, That any Judgment whatſoever given by Perſons who had no good Commiſſion to proceed againſt the Perſon condemned, may be falſify'd by ſhewing the Special Matter without Writ of Error, becauſe it is void; as where a Commiſſion authoriſes to proceed on an Indictment taken before *A. B. C.* and twelve others, and by Colour thereof the Commiſſioners procced on an Indictment taken before eight Perſons only.

Sect. 4. Alſo it ſeems [x] agreed, That if the Treaſon or Felony of which a Man is attainted, be afterwards pardoned by Parliament, the Attainder may be falſify'd by himſelf or his Heir without Plea.

[a] 14 H. 4 27. a. b. *Abridged*, Bro. Utlagary, 15. Long quinto Ed. 4, 5. *Abridged* Bro. Error, 155. Dyer 222, pl. 23. 223. pl. 26. *and it is ſaid not to be material whether it were delivered to the Sheriff or not.* Co. Lit. 128. b. Bro Utlag. 8. 4 E. 4, 42. a. Cont. Fitz. Error, 77. Vide Fitz. Error, 42.

[b] Co. Litt. 259. b. 33 H. 6, 1. b. 45. a. *Abridged* Fitz. Utlagary, 27.

[c] 11 H. 7, 4. b. *Abridged*, Bro. Utl. 78. 16 E. 4, 9. b. *Abridged* Bro. Error, 172. Fitz. Utl. 41. Vide 19 Ed. 4. 8. b.

But it is agreed, That an Outlawry without any Original is not void, but voidable only. Fitz. Color, 45. Utlagary, 18. V. 7 H. 7, 5. b. *Abridged* Fitz. Error, 52. Keilw. 19 b. Bro. Utlagary, 45. Long quinto Ed. 4. 116. b.

[d] 33 H. 6, 1. b. 45. a. *Abridged* Fitz. Utl. 27. 8 H. 6. 37. pl. 8. *Abridged* Fitz. Error. 19. Bro. Utlagary, 19. *Abridged* Fitz Error, 26. Long quinto Ed. 4, 116. b. Bro. Utlagary, 45. [f] Dy. 206. pl. 10. [g] Dy. 41. pl. 7. [h] Fitz. Utlagary, 41. 38 H. 6. 31. a. *Abridged* Fitz. Utlagary, 31. *Abridged* Fitz. Diſcontinuance, 3. 16 Ed. 4, 9. b. Bro. Error, 172. Fitz. Diſcontinuance, 17. *Abridged* Fitz Diſcontinuance, 22. 2 Rich. 3. 13. b. Bro. Miſnoſmer, 80. Variance, 90. [i] *Abridged* Fitz Error, 19. 1 And. 36. pl. 92. 1 Roll. Abr. 743. pl. 6, 7. 2 Inſt. 670. Cont. Bro. Utlagary, 34. 39 H. 6 1. b. [k] 1 Roll. Abr. 743. Lett C. 37 H. 6, 17. b. *Abridged* Fitz Utlagary, 19 H, 6. 2. a. 11 H. 4, 34. a. 21 Ed. 3. 56. b. 20 H. 6, 18. 8 H. 6, 37. a. Bro. Utlagary, 28. 4 E. 4, 42, a. b 43. *Abridged* Bro. Error, 158. Utlagary, 67. 19 H. 6. 2. a. *Abridged* Fitz Error, 26. Vide Palmer 43. Contra, 11 H. 7, 4. b. *Abridged* Bro. Utlagary, 78. [l] *Not for the Want of an Addition*, 19 H 6. 2. a. *Abridged* Fitz. Error, 26. 11 H. 6, 15. b. 54. [m] Supra, Ch. 27. Sect. 127. 9 H. 6, 15. b. Bro. Utlagary, 20, 34. 39 H. 6, 1. b. [n] 1 Bulſt. 109 1 Sid. 144. [o] Co Litt. 259. b. Vide 11 H. 7. 4. b. Bro. Utlagary, 78. 33 H. 6, 1. b. *Abridged* Fitz. Utlagary 27. 8 H. 6, 37. a. b. *Abridged* Bro. Utlagary, 19. [p] Cro. Eliz. 489. 490. [r] H. P. C 270 3 Inſt. 230. *Yet the contrary ſeemt holden* 49 Ed. 3, 11. 49 Aſſ. pla. 2. Bro. Coro. 205 *or* 6. 207 *or* 8. Fitz Traverſe, 19. [ſ] H. P. C. 270. 3 Inſt. 231. Bro. Traverſe de Office, 35. 7 Ed 4 1, 2. Fitz. Eſtopel, 91. [t] *See the Books above-cited.* [u] H. P. C 270. 3 Inſt. 231. Plow. Com 392, &c [x] 3 Inſt. 232. H. P. C. 271. 8 Co. 79 b Vide Supra Ch. 37. S. 53. Cro. El. 72. Cro. Eliz. 4. *'tis ſaid that a Writ of Error lies on ſuch a Pardon. But this is contrary to* 3 Inſt. 231. *and* 6 Co. 14. a. *for the avoiding of an Outlawry by the King's Pardon.* Vide ſup. ch 49 S. 15. Fitz. Chart. 27. Bro. Err. 56. 18 Ed. 3, 38. Bro App 7. 92. 9 H. 5. 14, b. 15 a.

Sect.

Sect. 5. But it hath been [y] adjudged, That the King's Letters Patents reverſing an Attainder are void, unleſs they be afterwards made good by Act of Parliament.

Sect. 6. It ſeems generally agreed, That by the Common Law, in [z] *favorem vitæ*, an Outlawry of Treaſon or Felony might be avoided by Plea that the Defendant was in * Priſon, or in the King's Service beyond the † Sea, *&c.* at the Time of the Outlawry ** pronounced againſt him. But I take it to be generally [a] agreed, That no Outlawry for any other Crime, (againſt a Party [b] rightly deſcribed) can be avoided by the Plea of any Matter [c] of Fact whatſoever.

Sect. 7. And it is enacted by 26 *H.* 8. 13. and 5 *&* 6 *Ed.* 6. 11. *That all Proceſs of Outlawry to be had or made within this Realm, againſt any Offenders in Treaſon, being reſiant or inhabited out of the Limits of this Realm, or in any of the Parts beyond the Seas at the Time of the Outlawry pronounced againſt them, ſhall be as good and effectual in Law to all Intents and Purpoſes, as if ſuch Offenders had been reſident and dwelling within this Realm at the Time of ſuch Proceſs awarded, and Outlawry pronounced.* [d] *Provided, That the Party ſo to be outlawed, ſhall, within one Year next after the ſaid Outlawry pronounced,* [e] *yield himſelf to the Chief Juſtice of* England *for the Time being, and offer to traverſe the Indictment or Appeal whereupon the ſaid Outlawry ſhall be pronounced as is aforeſaid, that then he ſhall be received to the ſame Traverſe, and being thereupon found Not guilty by the Verdict of twelve Men, he ſhall be clearly acquitted and diſcharged of the ſaid Outlawry, &c.*

Sect. 8. And it hath been [f] reſolved, That theſe Statutes extend as well to Treaſons by ſubſequent Statutes as to thoſe within 25 *Ed.* 3.

Sect. 9. It ſeems generally agreed, That any Outlawry whatſoever may be avoided by a Defendant's coming in upon the [g] *Capias Utlagatum*, and pleading a [h] Miſnoſmer either of the Name, or Addition in the Writ, *&c.* as by ſhewing that whereas he is called by ſuch a Name of [i] Baptiſm, or [k] Surname, he hath been always known by a different one, and not by that in the Writ, *&c.* or whereas he is named of ſuch Eſtate, Degree, or Myſtery, that he hath ſome other [l] Addition, and not that in the Writ *&c.* Alſo it is ſaid in many [m] Books, that he may plead, That there is no ſuch Town as that whereof he is named. And it ſeems clearly agreed, That he may plead that at the Time of the Writ purchaſed, and ever ſince, he hath made his Abode at ſome [n] other Town, and not at that in the Writ, *&c.*

[y] 29 Ed. 3. 25. a. 1 Rol. A. 489. Letter Y.

[z] Co. L. 269. b. V. 1 c H. 4. 7. a. *Abridged* Fitz. Reſpon. 101.

* Fitz. Utl. 2, 11, 18, 27. 33 H. 6. 1. b. 7 H. 6 25. a. Br. Utl. 18, 40. 38 Aſſ. pl. 17. 27 Aſſ. pl. 47. Vide Fitz. Coro. 123. 8 H. 4, 13. b. 3 Inſt. 32. Cont. 21 Ed. 4. 73. b. Bro. Utl. 57. 1 H. 7. 13. Bro. Utlaga. 68 Coro. 128. *That he who pleads this Plea muſt ſhew in whoſe Cuſtody he was, and in what County, and muſt alſo aver his Plea; and by* 5 Ed. 3, 13. *an Averment is given againſt the Teſtimony of a Sheriff or others, having no Record teſtifying ſuch Impriſonment.*

† Fitz. Utl. 11. 2 E. 4. 1. a. b. *Abridged* Fitz. Reſpond, 54. 9 H. 4. 3. a. Fitz. Scire Facias, 64. 8 Co. 107. 101. 7 H. 6, 11 H. 7 5. a. Bro. Utl. 79. 4 Ed. 4 10. b. Cont. Fitz. Coro. 123. Vide 10 H. 4 7. a. *Abridged* Fitz. Reſ. 101. 9 Co. 207. Co. 31. b. Co. Litt. 74. a.

** Fitz. Utlagary, 2, 48. Forfeiture, 19. Reſpond. 54. 25. a. *Abridged* Bro. Utlagary, 18. 16 Ed. 4, 6. a.

[a] Co. Litt. 259. b.

[b] Vide infra, Sect. 9.

[c] *Not by the Plea of Impriſonment.* Fitz Utl. 27, 47. 33 H. 6. 1. b. 45 a. *nor by the Plea of being beyond Sea.* Fitz Utl. 27. 33 H. 6. 1. 45. a. *Caſe.*

[d] 5 *&* 6 E 6. 4.

[e] Vide. State Trials, V. 3. f. 335. 3 Mod. 47. 4 Mod. 366. *Sir* Tho. Armſtrong's *Caſe.*

[f] 3 Inſt. 32, 216, *But ſee* Dyer, 287. pl. 48. *See alſo* 2 Jon. 180. *Error aſſigned for the Reverſal of an Outlawry of High Treaſon, That the Defendant was beyond Sea at the Time.*

[g] 33 H. 6. 1. b. 38, 45. a. Fitz. Utlagary, 22, 23, 26, 27, 29, 32, 35, 37, 44. Nonſuit, 6. Eſtoppel, 47, 54, 67. Dyer 192. pl. 25. Bro. Utlagary, 1, 22, 23, 24, 25, 26. Miſnoſmer, 52. 1 Ed. 4. 2. b. 21 H. 6, 50. b. 5 H. 7, 16. a. 7 Ed. 4 1. 27 H. 8. 11, 12. 22 H. 6. 23. a. 19 H 6, 80. a. b. 5 H. 5. 7. b. 28 H. 6. 2. b. Vide Fitz. Variance, 74. 19 H. 6, 58. a. 22 Ed. 4, 37. 38.

[h] 33 H. 6. 1. b. 45. a. *But in the Abridgment of this Caſe,* Bro. Utlagary, 2. *the contrary ſeems to be holden.* Fitz Utlagary, 27.

[i] Fitz. Utlagary, 44. Bro. Utlagary, 1. 27 H. 8. 11, 12.

[k] 14 Ed. 4. 6. b. Bro. Utlagary, 53. 19 Ed. 4, 24, 25. Bro. Scire Facias, 132. Miſnoſmer, 1. 27 H. 8. 11, 12. 12 H 6, 7 b. *So if one be called in the Writ the Son of J. S. he may plead that he is the Son of W. S.* 10 Ed. 4, 12. b. Bro. idempnitate nominis, 9.

[l] Fitz. Nonſuit, 6. Eſtoppel, 47, 67. 1 Ed. 4. 2. a. b. 21 H. 6. 50. b. 28 H. 6. 2. b. Fitz. Utlagary, 32, 35, 37. Bro. Utlagary. 15, 24, 78. Miſnoſ. 52. 5 H. 7. 16. a. 7 Ed. 4. 1. 5 H. 5, 7. b. *Abridged* Bro. Utl. 15. Fitz. Utl 37. *But 'tis ſaid That ſome were of Opinion, That the Party ſhou'd be put to his Writ of Error, becauſe he is the ſame Perſon.* See 38 H. 6. 1. Bro. Utl. 32, 51. 10 Ed 4. 16. a. Bro. Scire Facias, 132. 9 Ed. 4. 24. 25.

[m] Fitz. Utl. 23, 26. 22 Ed. 4. 37. b. 22 H 6. 23. a. 33 H. 6. 51. a. Bro. Utl. 26. *the 2d.* Vide Reſt. Entr. 300, pl. 24. 301. pl. 25, 26. *But the contrary is holden.* 33 H. 6. 1. b. *becauſe ſuch Plea won'd avoid the Outlawry againſt all Perſons.* Bro. Utl. 29. *there is an Opinion to the contrary, but it ſeems not warranted by the Year Book.*

[n] Fitz. Utl. 22, 23, 25, 29, 30, 33. Eſtoppel, 54. Error, 23. 38 H. 6. 1. a. b. 28 H. 6 2 a b. 33 H. 6, 7. a. 16. a. 23. a. b. 19 H. 6, 80. a. b. Dyer, 192. pl. 25. 2 E. 4. 1. b. Bro. Utl. 22, 25, 32, 33, 58. 21 Ed. 4 79. Keil. 101. *Such Matter is pleaded without any Traverſe of the Place in the Indictment.* Vide 22 E. 4. 37, 38. 20. H 6. 19. b. *It is adjudged* 28 H. 6. *Abridged* Fitz. Utl. 25. *That it is no Plea for one named of the Pariſh of* C. *that there are* 3 *Vills in the ſame Pariſh,* viz. D. E. F. *and that he was commorant at* D. *and therefore ought to have been named of it.*

and it is [p] said, That by such Plea the Outlawry shall only be avoided as to the Person who pleads it (who shall [q] not be intended to be the Person meant) and shall stand in Force against the Person of the Name and Addition in the Record. But it is said, That a Person of the same Name and Addition as are mentioned in a Record of Outlawry, [r] cannot avoid it by averring that there are two Persons of such Name and Addition, and that the Person intended is the Elder, and he himself is the Younger, but shall be put to his Writ of *idempnitate nominis*, which is said by some to be the [s] only Remedy in such Case after an Outlawry returned. And it seems, That notwithstanding in Civil Causes [t] before an Outlawry is returned one of the same Name may come into Court, and shew [u] that he is not the Person intended; whereupon if the Plaintiff confess it, the Diversity of the Names shall be entred on the Roll, and a new Exigent shall issue with a fuller Description of the Person intended; Yet this * cannot be done upon an Indictment, without a Writ of *idempnitate nominis*, because it would make the Process variant from the Indictment, which cannot be altered without the Consent of the Jurors.

[p] 39 H. 6. 1. b. Bro. Utl. 34, 73. 10 H. 6. 4. b. 30 H. 6. 2. pl. 9. Fitz. Err. 23. 21 H. 7. 13. pl. 16. *But it is said*, 21 H. 6, 21. b. *Abridged* Fitz. Fitz. Scire facias, 55. Bro. Utl. 23. *That a* Cap. ad Satisfaciendum *the Judgment is affirmed or disaffirmed by the Affirmance or Avoidance of the Outlawry.* Vide 22 H. 6. 16. a. Bro. Utl. 25. 19 H. 6. 58. a. b. Fitz. Utl. 21.

[q] *And for this Cause this is a good Plea in Avoidance of the Plea of Outlawry in Disability.* Fitz. Nonability, 14. 21 H. 7, 13. pl. 16. 7 E. 4. 1. Br. Nona. 50.

[r] 21 H. 7. 13. pl. 16. 14 H. 4. 27. a. b. Fitz. idempnitate nominis, 2, 3. Vide Bro. Utl. 29, 55, 56. 21 Ed. 4, 15. a. 54 a. 13 H. 6, 7. b. Fitz. Utl. 1, 24, 43. Variance, 74.

[s] Fitz Utl. 6, 16. Resp. 21. Nonab. 17.

[t] 21 E. 4. 15, a. 13 H. 7. 12. a. Bro. idempn. nominis, 3, 5, 7, 8. Fitz. idemp. nomi. 3, 6, 7. Cont. F.N.B. 268. Lett. B.

[u] F. N. B. 268. Letter A. Bro. idempnitate nominis, 3, 4, 11. 14 H. 4, 27. Fitz idempnitate nominis, 5. 21 Ed. 3, 36. b. Cont. Fitz. idempn. nominis 4. Bro. idempn. nominis 6. Long quinto Ed 4, 51. * Fitz. idemp. nominis 3. F.N.B. 268. Lett. B. Bro. idempn. nominis 2, 11. 9 H. 4. 3. [a] Cro. El. 225, 273, 558. 5 Co. 111. a. Owen, 147, 148. 1 Leon, 325, 326. Salk. 295. Shower. 13. [b] Vide Salk. 60, 61. [c] 1 H. 7. 13. b. Bro. Error, 135. [d] 1 Sid. 69. 1 Bulst. 71. 3 Mod. 42. 1 Ro. Re. 175. [e] Dyer 34 pl. 20. 1 Keb. 141. pl. 11. 1 Syd. 316. 22 E. 4. 37. b. 3 Keb. 29. 4 E. 4. 10 pl. 14. Fitz Error, 52. 7 H. 7. 5. b. 4 Ed. 4, 10. pl. 14. [f] *The Queen and* Strafford. Mich. 12. Annæ *upon Examination of all the Precedents.* [g] 2 Salk 495. Vide 3 Keb. 29. [h] 3 Inst. 214, 215.

And now I am to shew how Judgments in Criminal Cases may be avoided by Writs of Error; as to which having shewn already, *Ch.* 29. *Sect.* 40. That the Reversal of the Attainder of the Principal *ipso facto* reverses that of the Accessory, I shall in this Place only observe the following Particulars.

Sect. 10. *1st*, That it seems to be in a great Measure [a] settled, That a Writ of Error to reverse an Attainder of Treason or Felony may be brought as well by the Executor as by the Heir of the Party, but [b] no other Person whatsoever.

Sect. 11. *2dly*, That a Person attainted of Treason or Felony, before he can have a Writ of Error to reverse his Attainder, must [c] assign his Errors, and thereupon have Leave from the Court to prosecute his Writ of Error.

Sect. 12. *3dly*, That no Writ of Error for the Reversal of an Attainder of Treason or Felony is to be [d] allowed without an express Watrant from the King, or the Consent of the Attorney General.

Sect. 13. *4thly*, That an Attainder of Felony of a Person who had any Lands, shall never be reverstd by Writ of Error [e] without a *Scire facias* against all the Ter-tenants, and Lords mediate and immediate; but it is [f] settled, That such *Scire Facias* is not necessary in the Case of High Treason. Also it is [g] said, That it is not necessary in the Case of Felony when it suggested on the Roll that the Party had no Lands, and the Attorney General confesses it.

Sect. 14. *5thly*, That it hath been [h] settled, That the Statute of 33 *H.* 8. 20. which enacts, *That if any Person shall be attainted of High Treason by the Course of the Common Laws or Statutes of this Realm, that in every such Case, every such Attainder by the Common Law shall be of as good Strength, Value, Force and Effect, as if it had been done by Authority of Parliament*, is to be intended of lawful Attainders by due Course of the Common Law, and not of erroneous and void Attainders, which therefore may be avoided in the same Manner as before.

[a] *Which is called the 29th in the printed Statutes by a Miſtake.*
3 Lev. 333.
[b] 3 Inſt. 213.
[c] 1 Sid. 208.

Sect. 15. *6thly*, That it is alſo clear, That the Statute of [a] 28 *Eliz.* 2. which enacts, *That no Record of Attainder that then was of High Treaſon, where the Party is or hath been executed, ſhall be reverſed, avoided or impeached by any Plea or Writ of Error*, extends not [b] to Attainders ſince that Time.

Sect. 16. *7thly*, [c] That it hath been holden, That a Writ of Error lies in the King's Bench of an Attainder before the Lord High Steward.

And now I am in the ſecond Place to ſhew the Effect of the Avoidance of a Judgment, as to which I ſhall take Notice only of the following Particulars.

[d] Bro. Coro. 27, 143 *or* 144. 164 *or* 165.
7 H. 7. 5 pl 7.
18 Ed. 4. 9. pl. 16.
3 Mod. 42.
Cro. Ja. 464
Fitz. Error, 52.
Cro. Ca. 365.
[e] *That the Law is the ſame in Civil Cauſes.*
Fitz. Error, 41.
37 H. 6. 17.
Bro. Utlagary
Abridged Fitz.

Sect. 17. 1*ſt*, That it is [d] agreed, That after an Outlawry of Treaſon or Felony is reverſed, the Party ſhall be put to [e] plead to the Indictment, for that ſtill remains good.

Sect. 18. 2*ndly*, That it is ſaid [f] by Sir *Edward Coke*, If the Judgment be erroneous, both that and the Execution thereupon, and all former Proceedings ſhall be [f] reverſed by Writ of Error; but if the Execution be erroneous that only ſhall be reverſed.

Sect. 19. 3*dly*, That it hath been [g] adjudged, That if the King grant over the Lands of a Perſon outlawed for Treaſon or Felony, and afterwards the Outlawry be reverſed, the Party may enter on the Patentee, and needs neither to ſue a Petition to the King, nor a *Scire facias* againſt the Patentee.

28. 20 H 6. 3. a. *Abridged* Fitz. Protection, 11. Bro. Utlagary, 74. Cont. 21 H. 6. 50. pl. 3. Nonſuit, 6. Bro. Utlagary, 24. Vide Bro. Utlagary, 35. [f] 3 Inſt. 2. 10. [g] 1 And. 188.

CHAP. LI.

Of Execution and Reprieve.

AND now nothing remains but to ſhew in what Manner a Perſon condemned is to be executed or reprieved; as to which, having ſhewn already, *Ch.* 30. *Sect.* 8. That a Perſon attainted, ſtanding Mute to a Demand why Execution ſhall not go againſt him, ſhall not be awarded to his Penance, but to the ordinary Execution proper for the Crime, I ſhall farther obſerve only the following Particulars,

[h] 1 Sid. 72.
1 Lev. 61.
1 Keb. 244.
Supra, Ch. 44. S. 18.
[i] Poph. 131.
Cro. Ca. 176.
Cro. Ja. 495.
Ja. 495.

Sect. 1. *Firſt*, That the Court of King's Bench hath not only Power to award Execution againſt Perſons attainted there, but alſo againſt Perſons attainted in [h] Parliament, or any other [i] Court, the Record of their Attainder or a Tranſcript thereof being firſt [k] removed into the Court of King's Bench, and themſelves brought thither by *Habeas Corpus*.

[k] Cro. Ca. 176. Cro. Ja. 495. 1 Sid. 72. 1 Lev. 61. 1 Keb. 244. [i] Cro. Ca. 176. Cro. Ja. 495. 1 Sid. 72, 73.

Sect. 2. 2*ndly*, That Execution ought [a] not to be awarded into a different County from that wherein the Party was tried and convicted, except only where a Record of Attainder is removed into the Court of King's Bench, which [b] may award the Execution in the same County wherein it sits.

Sect. 3. 3*dly*, That where a Person attainted hath been at Large after his Attainder, and afterwards is brought into Court and demanded why Execution should not be awarded against him, [c] if he deny that he is the same Person it shall be [d] immediately tried by a Jury returned for that Purpose.

Sect. 4. 4*thly*, That the Court [f] may command Execution to be done without any Writ.

Sect. 5. 5*thly*, That it is [g] holden by *Coke* and *Hale*, That no Execution can be warranted unless it be pursuant to the Judgment, and therefore that it cannot be altered by the King, as from hanging to beheading. Yet since there is a great Number of Precedents, where [o] Men condemned to be hanged for Felony, and Women condemned to be burnt [p] for Treason, have been beheaded by Force of a special Warrant from the King to that Purpose; and since [q] *Bracton* and [r] *Staundforde* and the [s] *Year-Book* of 35 *H.* 6. speaking of this Matter, are not so express as *Coke* and *Hale*, but say only in general, That the Sheriff cannot lawfully behead a Man who is only condemned to be hanged, by which they may perhaps intend no more than that he cannot lawfully do it of his own Authority; I shall leave this Matter to be farther considered. However it is agreed, That where beheading is Part of the Judgment, as in Case of High Treason, the King may [t] pardon all the rest, and consequently in such Case the Judgment will be well executed by beheading only.

Sect. 6. 6*thly*, That it seems [u] agreed at this Day, That an Execution cannot be lawfully executed by any but the proper Officer.

Sect. 7. 7*thly*, That it is [x] clear, That if a Man condemned to be hanged, come to Life after he be hanged, he ought to be hanged again; for the Judgment was not executed till he was dead.

Sect. 8. 8*thly*, That it seems agreed, That every Court which has Power to award an Execution, has also of Common Right a discretionary Power of granting a Reprieve; as * where a Person pleads a Pardon defective in Point of Form, but sufficiently shewing the King's Intention of Mercy; or where it is ** doubtful whether the Offence be not included in a general Statute-Pardon; or [y] whether as it is laid in the Indictment, it amounts to so high a Crime as that with which the Prisoner was charged. And it seems [z] agreed at this Day, that Judges continue to have this Power after their Commission is determined.

[a] Cro. Ca. 176. 3 Mod. 124, 125. [b] Cro. Ca. 176. Cro. Ja. 495. [c] Vide Poph. 131. Cro. Ca. 176. Cro. Ja. 495. Crompt. Just. 183. b. [d] 1 Sid 72. 1 Lev. 61. *Whether the Party may have peremptory Challenges on such a Trial.* Supra Ch 43. Sect 6. [f] Finch of Law, 478. 3 Mod. 42. *But sometimes Execution is commanded by Writ, as in* Sir Walter Raleigh's *Case.* Cro. Ja. 496. *and in* Lord Stafford's *Case*, State Trials, Vol. 2. fol. 704, 705. *being both in the Custody of the Lieutenant of the Tower, and beheaded only.* [g] 3 Inst. 52, 211, 212, 217, 12 Co. 130. H. P. C. 272. *and accordingly* Lord Dacres, *Lord* Stourton, *and* Sanchar, *a* Scotch *Lord, were hanged for Murder.* 3 Inst. 211, 212. 9 Ca. 121. b. [o] *Lord* Hungerford *in* 32 H 8. 3 Inst. 211. *Duke of* Somerset *in* 5 Ed. 6. 3 Inst. 211. *Lord* Audley *in* 6 Car. 1. State Trials, Vol. 1. fol. 271. [p] *Queen* Catherine Howerd, *Lady* Jane Grey, *Countess of* Salisbury, *Lady* Alice Lisle. [q] Bracton 104 b. Vide 3 Inst. 217. [r] S. P. C. 13. a. [s] 35 H. 6. 38. [t] H. P. C. 273. 3 Inst. 31, 52, 212. 12 Co. 130. Supra, ch. 37. Sect. 12. 3 Inst. 31. *it is said, That such a Pardon must be under the Great Seal; but it seems admitted that it may be by Writ.* State Trials, Vol. 2. f. 704, 705. [u] *See* B. 1. Ch. 28 Sect. 8, 9 [x] 6 Ed. 4. 4. Fitz. Coro. 335. Finch of Law, 389, 467. Vide Supra, Ch. 48. Sect. 7. * 26 Ass. pl. 46. *Abridged* Fitz. Office de Court, 34. ** Dyer 235. pl. 19. [y] Dyer 296. pl. 21. [z] Dyer 205. pl. 5. Supra Ch. 6. Sect. 7.

Sect. 9. *9thly*, That it is clear, That if a Woman quick with Child be condemned either for [a] Treaſon or [b] Felony, ſhe may alledge her being with Child in order to get the Execution reſpited, and thereupon the Sheriff [c] or Marſhal ſhall be commanded to take her into a private Room, and to impanel a Jury of [g] Matrons to try and examine whether ſhe be quick with Child or not; and if they find her quick with Child, the Execution ſhall be reſpited [h] till her Delivery. But it is agreed, That a Woman [i] cannot demand ſuch Reſpite of Execution by Reaſon of her being quick with Child more than once; and that ſhe can neither ſave herſelf by this Means from [k] pleading upon her Arraignment, nor from having [l] Judgment pronounced againſt her upon her Conviction. Alſo it is ſaid both by [m] *Staundforde* and *Coke*, That a Woman can have no Advantage from being found with Child, unleſs ſhe be alſo found quick with Child.

[a] H. P. C. 272. 3 Inſt. 17.
[b] Quære *if before Juſtices of Peace*, Keil. 51. a.
[c] S. P. C. 198. Lett. C. 22 Aſſ. pl. 71. *Abridged* Fitz. Coro. 180. Bro. Coro. 88.
[g] 3 Inſt. 17. Finch of Law 478. S. P. C. 198. Letter C.
[h] State Trials Vol. 4. fol. 612. S. P. C. 198. Letter C. 3 Inſt. 17. State Trials, Vol. 4. f. 612. Fitz. Coro. 253, 410. 23 Aſſ. pl. 2. *Abridged* Bro. Coro. 97. Fitz. Coro. 188. 25 Ed. 3. 42. b. *Abridged* Fitz. Coro. 130. 12 Aſſ. pl. 11. *Abridged* Fitz. Coro. 168. Bro. Coro. 72. Bro. Pain, 11.
[i] Finch of Law, 478. S. P. C. 198. Letter C. Fitz. Coro. 168, 253. 3 Inſt. 17. H. P. C. 272, 23 Aſſ. pl. 2. *Abridged* Bro. Coro. 97. Fitz. Coro. 188. 25 Ed. 3. 42. b. *Abridged* Fitz. Coro. 130. 12 Aſſ. 11. Bro. Coro. 7. 2 Pain, 11.
[k] Finch of Law, 478. 3 Inſt. 17. 22 Aſſ. pl. 71. *Abridged* Fitz. Coro. 180. Bro. Coro. 88.
[l] State Trials, Vol. 4. fol. 611. S. P. C. 198. Lett. C. 3 Inſt. 17.
[m] 3 Inſt. 17. S. P. C. 198. Lett. C. *and in* 22 Aſſ. pl. 71. *Abridged* Fitz. Coro. 180. Bro. Coro. 88. *it is expreſsly ſaid, That the Inquiry was whether the Woman were enſeint with a Live Child or not.* *See alſo* H. P. C. 272. *and* Finch of Law, 478. *Yet* Fitz. Coro. 130, 168, 188, 240, 410 22 Aſſ. pl. 2. 25 Ed. 3. 42. b. 12 Aſſ. pl. 11. Bro. Coro. 72. Bro. pain, 11. *'tis ſaid only, That the Woman was found enſeint or pregnant.*

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FINIS.